80-1102

Supreme Court, U. S.
FILED
JAN 2 1981
MICHAEL RODAK, JR., CLERK

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

LAWRENCE LUNG, et al.,

Appellants,

vs.

FRED L. O'CHESKEY, et al.,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

Of Counsel:
JOHN P. OTTO
45 W. Jefferson
Phoenix, Arizona 85003
(602) 252-7461

FRED J. MORTON
210 N. Campbell
El Paso, Texas 79901
(915) 532-3601
Attorney for Appellants

IN THE

SUPREME COURT OF THE UNITED STATES

QUESTIONS PRESENTED

1. Whether the income tax imposed by the State of New Mexico may apply to nonresidents employed at an isolated, self-sufficient exclusive federal enclave located geographically within the boundaries of the State without offending the Privileges and Immunities Clause and the Fourteenth Amendment, there being no claim of "fiscal relation" between the full measure of the tax imposed and the (non-existent) benefits, protection or opportunities afforded by the taxing state?

2. Whether the New Mexico state income tax is violative of the Privileges and Immunities Clause, the Fourteenth Amendment and of this Court's decision in *Travis v. Yale and Towne Mfg. Co.*, by effecting a partial denial to nonresidents of exemptions granted in full to residents, when applied to Texas residents required to include non-New Mexico income on New Mexico's apportionment form?

3. Whether a state can constitutionally return $51 million in surplus through income tax credits to residents only under the guise of rebates of gross receipts taxes paid by them without proof of payment while denying any relief to nonresidents?

4. Whether exhaustion of administrative remedies can be required, in the face of Due Process and 42 U.S.C. §1983, to deny refund of taxes unconstitutionally collected from a class of nonresident taxpayers, where it is clear that resort to administrative action would be futile?

LIST OF PARTIES

LAWRENCE LUNG, MELVIN D. DELANO, OSCAR H. CALDERON, FERNANDO FUENTES and JERRY L. TENISON, on behalf of themselves and other persons similarly situated in the same class and classes of persons, and the TEXAS ASSOCIATION ON NEW MEXICO INCOME TAX, an unincorporated association, on behalf of itself, its members and other persons who have been and will be similarly situated in the same class or classes of persons (Texas residents employed at White Sands Missile Range from whom the New Mexico State income tax has been, is being, or will be, collected),

Appellants,

vs.

FRED L. O'CHESKEY, individually and in his capacity as Director, Bureau of Revenue of the State of New Mexico, and his successors in office (including FRED MUNIZ, presently Secretary, Department of Taxation and Revenue of the State of New Mexico), HONORABLE BRUCE KING, individually, and in his capacity as Governor of the State of New Mexico, and his successors in office, and THE STATE OF NEW MEXICO,

Appellees.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	3
Raising the Federal Questions	3
Statement of the Case:	
A. Background	5
B. The Facts	6
The Questions are Substantial:	
A. Fiscal Relation	13
B. Diminution of Exemptions	18
C. Medical and Dental Expense and Grocery Tax Rebate	20
D. Exhaustion of Administrative Remedies	21
Conclusion	23
Certificate of Service	24
Appendices:	
A. New Mexico Supreme Court Opinion Below	1a
B. District Court Order Below	1b
C. District Court's Findings of Fact and Conclusions of Law	1c
D. District Court Judgment Below	1d
E. New Mexico Supreme Court Judgment Below	1e
F. Notice of Appeal	1f
G. Constitutional Provisions and Statutes Involved:	
1. U.S. Constitution	1g
2. U.S. Code	2g
3. New Mexico Statutes	6g

TABLE OF AUTHORITIES

Cases:	Page
Arizona Public Service Co. v Snead, 441 U.S. 141 (1979)	2, 16
Austin v. New Hampshire, 420 U.S. 656 (1975)	2, 16, 19
Baldwin v. Montana Fish & Game Com'n., 436 U.S. 371 (1978)	12, 17
Bowen v. Johnston, 306 U.S. 19 (1939)	11
Burns v. State Bureau of Revenue, 439 P.2d 702 (N.M. 1968) cert. denied 393 U.S. 841	5
Central Machinery Co. v. Arizona Tax Com'n., ... U.S. ....., 100 S.Ct. 2592 (1980)	2
Charleston Federal S. & L. Ass'n. v. Alderson, 324 U.S. 182 (1945)	2
Corfield v. Coryell, 6 F. Cas. 546 (1825)	17
Cox Broadcasting v. Cohen, 420 U.S. 469 (1975)	3, 23
Crandall v. Nevada, 6 Wall. 35 (1868)	17
Crutcher v. Kentucky, 141 U.S. 47 (1891)	17
Dahnke-Walker Mill Co. v. Bondurant, 257 U.S. 282 (1921)	2
Evansville-Vanderburg A. A. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972)	14
Evco v. Jones, 402 U.S. 969 (1971)	16
Exxon Corp. v. Wisconsin Dept. of Revenue, ... U.S. ....., 100 S.Ct. 2109 (1980)	2
Gomez v. Perez, 409 U.S. 535 (1973)	3, 23
Greyhound Lines v. Brice, 339 U.S. 542 (1950)	17
Hanson v. Denckla, 357 U.S. 235 (1958)	2
Henry v. Mississippi, 379 U.S. 443 (1975)	22
Houghton v. Shaffer, 392 U.S. 639 (1968)	21
Kiker v. City of Philadelphia, 31 A.2d 289 (Pa. 1943) cert. denied 320 U.S. 741	18
King v. Smith, 392 U.S. 309 (1960)	21

Lung v. Jones, 322 F.Supp. 1067 (D.C.N.M. 1971) rev'd 405 U.S. 1051 5
Lung v. O'Cheskey, 358 F.Supp. 928 (D.C.N.M. 1973) aff'd 414 U.S. 802 5
McClanahan v. Arizona Tax Com'n., 411 U.S. 164 (1973) 15
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 16
Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) . . 14
Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425 (1980) 14
Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) 15
Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) . . . 14
Norfolk & W. Ry. Co. v. Missouri State Tax Com'n., 390 U.S. 317 (1968) 2, 13
Palmore v. U.S., 411 U.S. 389 (1973) 2
Prudential Ins. Co. v. Cheek, 259 U.S. 530 (1922) . . 3, 23
Rogers v. Alabama, 192 U.S. 226 (1904) 23
Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628 (1960) 2
Salomon v. State Tax Com'n., 278 U.S. 491 (1929) . . 13
Senior v. Braden, 295 U.S. 422 (1935) 2
Shaffer v. Carter, 252 U.S. 37 (1920) 12, 19
Shapiro v. Thompson, 394 U.S. 618 (1969) 17
State v. Ashby, 387 P.2d 588 (N.M. 1963) 5
Steffel v. Thompson, 415 U.S. 452 (1974) 21
Stokes v. Adair, 265 F.2d 662 (4th Cir. 1959) 11
Tiffany Const. Co., Inc. v. Bureau of Revenue, ... U.S. ....., 100 S.Ct. 3041 (1980), reversing and remanding 603 P.2d 332 (N.M. App. 1979) . 15, 16
Tot v. U.S., 319 U.S. 463 (1943) 20
Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) 4, 5, 18

Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905) 13
U.S. v. Lewisburg, 539 F.2d 301 (3d Cir. 1976) . . . 18
U.S. v. Mississippi Tax Com'n., 421 U.S. 599 (1975) 17
Washington v. Confederated Tribes, ... U.S. ....., 100 S.Ct. 2069 (1980) 14
White Mountain Apache Tribe v. Bracker, ... U.S. ....., 100 S.Ct. 2578 (1980) 2, 15
Wilwording v. Swenson, 404 U.S. 249 (1971) 21
Wisconsin v. J.C. Penney, 311 U.S. 435 (1941) . 13, 14, 17

FEDERAL CONSTITUTIONAL PROVISIONS:

Article I, §8, Cl. 3 . . . . . 3, 16
Article I, §8, Cl. 17 . . . . . 8, 18
Article IV, §2 . . . . . 3, 16, 17
Article VI, Cl. 2 16
Fourteenth Amendment 3, 14
Twenty-first Amendment 16

STATUTES (United States Code):

4 U.S.C. §§104-110 . . . . . 17, 18
5 U.S.C. §8101 et seq. 11
10 U.S.C. §2671 11
16 U.S.C. §457 11
18 U.S.C. §13 11
23 U.S.C. §120 7
23 U.S.C. §210 7
26 U.S.C. §3305(d) 11
26 U.S.C. §3306(c)(6) 11
28 U.S.C. §1341 . . . . . 5, 22
40 U.S.C. §290 11
42 U.S.C. §502 11
42 U.S.C. §1983 . . . . . 3, 4, 6, 21, 23

NEW MEXICO STATUTES:

§7-1-13 NMSA 1978 21
§7-1-26 NMSA 1978 . . . . . 3, 21
§7-2-3 NMSA 1978 3
§7-2-11 NMSA 1978 20
§7-2-14.1 NMSA 1978 . . . . . 4, 10, 20
§7-2-15 NMSA 1978 . . . . . 10, 20
§7-2-19 NMSA 1978 . . . . . 12, 19
§7-4-3 NMSA 1978 20
§7-4-4 NMSA 1978 20
§7-4-21 NMSA 1978 20
§19-2-8 NMSA 1978 8

MISCELLANEOUS:

Solomon, Nonresident Personal Income Tax:
A. Comparative Study in Eight States, 29 Fordham L. Rev 105 at 108 (1960) 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LAWRENCE LUNG, et al.,

Appellants

vs.

FRED L. O'CHESKEY, et al.,

Appellees

ON APPEAL FROM THE
SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

LAWRENCE LUNG, et al., Appellants, appeal from the final judgment of the Supreme Court of New Mexico dated October 8, 1980, holding the New Mexico state income tax laws, §§7-2-1 et seq. NMSA 1978, were constitutional in all respects as applied to them, affirming the judgment of the District Court of Santa Fe County.

OPINION BELOW

The opinion of the Supreme Court of New Mexico, which appears as Appendix "A" hereto, pp. 1a-4a, infra, is reported at 617 P. 2d 1317.

None of the actions of the trial court are reported: The District Court of Santa Fe County, by interlocutory order entered April 20, 1979, dismissed all claims for refund; its findings of fact and conclusions of law, dated August 28, 1979, in its final judgment, dismissing the action, on September 29, 1979, are all reprinted as Appendices "B", "C" and "D" hereto at pp. 1b, 1c, and 1d, infra, respectively.

JURISDICTION

The judgment of the Supreme Court of New Mexico was entered on October 8, 1980. See Appendix "E", 1e, infra. Notice of Appeal to this Court was duly filed in the Supreme Court of New Mexico on December 1, 1980. See Appendix "F", 1f, infra. A copy thereof was filed on the same date in the District Court of Santa Fe County, New Mexico.

This appeal is being docketed in this Court within 90 days from entry of the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). See *Austin v. New Hampshire,* 420 U.S. 656 (1975); *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979); *Senior v. Braden,* 295 U.S. 422 (1935); *Dahnke-Walker Mill. Co. v. Bondurant,* 257 U.S. 282 (1921); *Exxon Corp. v. Wisconsin Dep't. of Revenue,* U.S. , 100 S.Ct. 2109 (1980); *Central Machinery Co. v. Arizona State Tax Com'n.,* U.S. , 100 S.Ct. 2592 (1980); *Norfolk and W. Ry. Co. v. Missouri State Tax Com'n.,* 390 U.S. 317 (1968); and *White Mountain Apache Tribe v. Bracker,* U.S. , 100 S.Ct. 2578 (1980).

In the alternative, appellants invoke the jurisdiction of this Court to issue a writ of certiorari to the Supreme Court of New Mexico pursuant to 28 U.S.C. §§1257(3), 2103, and 2111 as to all issues presented herein, if necessary, see *Rohr Aircraft Corp. v. County of San Diego,* 362 U.S. 628 (1960); *Charleston Federal S. & L. Ass'n. v. Alderson,* 324 U.S. 182 (1945); *Hanson v. Denckla,* 357 U.S. 235 (1958); *Palmore v. U.S.,* 411 U.S. 389 (1973); or as to any issue incapable itself of being brought here by appeal, or in conjunction with those which are within this Court's appellate jurisdiction, *Cox*

Broadcasting v. Cohn, 420 U.S. 469 at 487 n14 (1975); *Prudential Ins. Co. v. Cheek,* 259 U.S. 530 at 547 (1922); *Gomez v. Perez,* 409 U.S. 535 at 537 n2 (1973).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following sections of the New Mexico tax laws, as applied, are challenged on this appeal as repugnant to the Privileges and Immunities (Article IV, §2) and Commerce Clauses (Article I, §8, clause 3) of, and the Fourteenth Amendment to, the federal Constitution: §7-2-3, 7-2-14.1, 7-2-15, 7-2-19 and 7-4-4 NMSA 1978. Also involved are Article 1, §8, Clause 17 of the U.S. Constitution, as well as §19-2-8 NMSA 1978, 4 U.S.C. §106(a) and 42 U.S.C. §1983. Pertinent portions of these constitutional and statutory provisions are set forth in Appendix "G", infra, pp. 1g-11g.

RAISING THE FEDERAL QUESTIONS

As appears in the opinion of the Supreme Court of New Mexico, each of the questions presented was raised, actually considered and decided by that Court. Specifically, this action was brought under New Mexico law (§7-1-26 NMSA 1978) and 42 U.S.C. §1983 in the District Court of Santa Fe County, New Mexico, for the specific purpose of having the State's income tax law declared unconstitutional as applied to the individual plaintiffs and to the class of Texas residents employed at the exclusive federal enclave known as White Sands Missile Range, and sought refund and injunctive relief as well, in an original and amended complaints which alleged the tax violative of and repugnant to the Privileges and Immunities and Commerce Clauses, the Fourteenth Amendment and the nonresident plaintiffs' rights to travel, engage in interstate commerce and to have free access to their place of federal employment, and their immunity from taxation by a state which afforded them no protection or benefits; and that various provisions of New Mexico law unconstitutionally subjected them

to double taxation and discriminatory rebates and refunds available only to residents. (Tr. 1-9).

Although appellants abandoned some issues raised in their original complaint, none of which are pertinent here, the others continued to be asserted through various stages of the proceedings, including motions, hearings and rulings thereon (Tr. 128), amended pleadings (Tr. 39-109) and the sending of notice to the class (Tr. 130) and on into the pre-trial order (Tr. 137-148), at which time the trial court allowed a new but similar constitutional issue to be raised, as the New Mexico Legislature had recently enacted the "grocery tax rebate" for residents only, a copy of which was attached to the Pre-Trial Order as Plaintiffs' Exhibit 10 (now codified as §7-2-14.1 NMSA 1978).

Appellants continued to assert these issues as plaintiffs at the trial on the merits by the introduction of testimony and documentary evidence (Tr. 175-332), by filing detailed proposed findings of fact and conclusions of law (Tr. 152-160), in final arguments and in briefs submitted to the trial court, the latter two of which are not of record.

The federal questions were reiterated by appellants before the Supreme Court of New Mexico. There, appellants renewed their points that the tax bore an unconstitutional proportion to the non-existent benefits afforded by the State to the non-resident taxpayers; that the State's required inclusion of non-New Mexico income resulted in unconstitutional double taxation, citing *Travis v. Yale and Towne Manufacturing Co.* for the proposition concerning the diminution of exemptions; and that the dental, medical expense and grocery tax rebate to residents only were unconstitutional; and that dismissal of the refund claims was contrary to decisions under 42 U.S.C. §1983. These claims, and another not pertinent here, were considered and expressly rejected by the New Mexico Supreme Court. See opinion below, Appendix "A", pp. 1a-4a, infra. The only issue which that court attempted to avoid was that claiming error in dismissing the refund claims for lack of exhaustion of administrative remedies, which the New Mexico Supreme Court held to be harmless in light of its holding that

the claims were properly denied as being without merit.

STATEMENT OF THE CASE

A. BACKGROUND

Since Texas residents employed at White Sands Missile Range in New Mexico have been in litigation with the State for over 18 years concerning the validity of its income tax as applied to them, appellants believe a brief recital of the historical background of this litigation is significant, prior to discussing the facts developed in the instant case:

In the early 1960's, a taxpayer's suit was filed by a Texas resident and the New Mexico Supreme Court in *State v. Ashby,* 387 P.2d 588 (1963), declared the State's income tax invalid because this Court's decision in *Travis v. Yale and Towne Manufacturing Co.,* 252 U.S. 60 (1920), unequivocally invalidated any state tax which allowed exemptions for residents but denied them to nonresidents. Between the time of the original action and prior to the actual decision of the New Mexico Supreme Court in *Ashby,* the Legislature repealed the sections which were to be held invalid and enacted tax laws with exemptions allowed to residents and nonresidents alike. Pursuant to New Mexico law enacted in 1964, White Sands employers started withholding state income tax from nonresident employees, some of whom brought an unsuccessful action in the state courts, *Burns v. State Bureau of Revenue,* 439 P.2d 702 (N.M. 1968) cert. denied 393 U.S. 841, on grounds different from those presented here. In 1969, the Texas residents employed at White Sands attempted to bring a constitutional attack on the tax in Federal Court, only to be denied access there twice, first on the basis that "property rights" were not protected under 42 U.S.C. §1983, *Lung v. Jones,* 322 F. Supp. 1067 (D.C.N.M. 1971) reversed 405 U.S. 1051 (1972), and finally on the basis that 28 U.S.C. §1341 prevented federal court litigation where a "plain, speedy and efficient remedy may be had in the courts of such state," *Lung v. O'Cheskey,* 358 F. Supp. 928 (D.C.N.M. 1973) affirmed 414 U.S. 802 (1973).

On December 11, 1973, the nonresident taxpayers filed the

instant state court action against the State, its Revenue Director and Governor, alleging the unconstitutionality of the tax as applied to them, seeking individual and class action declaratory, refund and injunctive relief and attorneys' fees under New Mexico law and 42 U.S.C. §1983 (Tr. 1-9). After some procedural skirmishes, including the granting of a motion to dismiss which had actually not been made by the State (Tr. 29), the trial court adhered to an earlier ruling dismissing the refund action in its entirety for failure to exhaust administrative remedies (Tr. 128), but proceeded to hear the action for declaratory and injunctive relief on the merits without a jury and eventually entered judgment in favor of the State on September 29, 1979, from which the appeal to the Supreme Court of New Mexico was taken.

B. THE FACTS

The relevant threshold facts as such were not hotly contested and many of them were agreed, but the proper constitutional significance, meaning and effect which should be placed upon them, was and is the crux of the litigation. The five named appellants, and the class of almost 2,000 others they and their unincorporated association represent, are Texas residents employed by the federal government or defense contractors at White Sands Missile Range (WSMR), a large but geographically isolated, exclusive federal enclave in the southernmost desert areas of New Mexico only six miles from the border of the State of Texas. The first atomic bomb was detonated not far from what is now the headquarters area of a missile testing facility, the sites for which were selected because of their isolation from populated areas. Approximately one-third of some 6,000 non-military employees of the Range live in El Paso County, Texas, and their work there is separated from the closest New Mexico community, Las Cruces (which is 29 miles from the enclave), by a mountain range (Tr. 207).

When assigned to duty at the Range, appellants commute daily either in private cars or government furnished transportation from El Paso to the Range, a distance in excess of 40

miles (one way), only 6.086 miles of which is on a road in New Mexico outside the federal reservation to the Texas state line. This road was built in the 1940's by the federal government as War Road II, and was maintained by it until 1975, at which time the State received all but 85¢ of a requested grant from the U.S. Department of Transportation for $928,-179 for re-surfacing of the road, after which the State purportedly assumed responsibility for future maintenance of the road, which carries the State designation of State Route 213 (Plaintiffs' Exhibits 4 and 5). This federal grant of virtually 100% percent of the estimated total cost was made from Department of Defense funds pursuant to 23 U.S.C. §210 (Defense access roads), not the usual federal aid highway participation of 60%, 70% or 95% in various primary, secondary and Interstate systems which are done pursuant to 23 U.S.C. §120.

In the late 1960's, the State built a road leading from the Las Cruces and Anthony areas over to War Road II, through a pass in the mountains known as Anthony Gap (being designated as State Route 404), which facilitated travel for New Mexico residents in the Las Cruces-Anthony areas and provided them a new route, in conjunction with War Road II, to the eastside of the mountains which divide the large community of El Paso, Texas.

When not on duty at the Range, many of the employees are absent from the area for extensive periods of time (Tr. 221-225), as they travel and work all over the United States and overseas in carrying out their role in the defense and space programs of the federal government, of which White Sands Missile Range is an integral part.

Because of its geographical isolation and the nature of the activities on the Range, which is federally created, owned, financed, protected, secured, operated and maintained, and which is a "closed base" in the sense that classified defense work is involved and to which physical access is limited (Tr. 210, 211), *all* of the usual essential governmental functions are performed thereon by the federal government, including providing streets, sewage, utilities, police and fire protection,

and medical facilities (Tr. 208, 209). Local law enforcement personnel do *not* conduct regular patrols on the 6-mile strip known as SR 213 (Tr. 255, 258), but go over to the area only to service the needs of New Mexico residents — "trouble calls" — concerning hot rodders creating problems on weekends (Tr. 255) near Chapparal, New Mexico, a small community of some 300 to 600 people, and mostly to service their need for vehicle registration compliance with New Mexico law (Tr. 257), and about once a month to investigate an accident in the area, none of which are identified as involving Texas residents or WSMR employees. MP's from Ft. Bliss, Texas, a military installation centered in the El Paso area but with properties on both sides of the New Mexico-Texas boundary between the states, occasionally patrol the area which includes SR 213 and cite speeders to appear in U.S. Magistrate's Court in Las Cruces, New Mexico (Tr. 230-239).

Because of their status as nonresidents, appellants cannot vote in the State of New Mexico and must pay higher tuition rates when enrolling in State schools and higher fees for hunting or fishing licenses than do residents (Tr. 214, 235, 236); the courts of New Mexico have no jurisdiction to grant them a divorce or effect service of process for them for activities occurring on the enclave.

In 1941, New Mexico ceded (§19-2-8 NMSA 1978) the Range (initially called Fort Bliss Target Range) to the federal government which accepted it, within the meaning of Article I, §8, clause 17 of the U.S. Constitution (Tr. 139), without retaining any jurisdiction over the area except that necessary to serve civil and criminal process for acts committed *outside* the enclave.

The trial court certified the class and ordered notice sent to all Texas residents then employed at WSMR from whom New Mexico tax was being withheld (Tr. 125-127, 130-132), which was accomplished (Tr. 130, 169, and 333). Of 1,896 persons notified, only four "opted out." (Tr. 398, 399). Over 86% (1,637) of the Texas residents were federal employees, and the remaining 259 were identified as employees of con-

tract employers at WSMR (Tr. 398, 399). The precise amount of taxes paid to the State by members of the class could not be ascertained from either the State's records or those at WSMR, but from the facts in evidence, the total amount is known to be substantial, a conclusion the State does not challenge. The facts in evidence disclose that 39.7% of the total of WSMR civil service employees were Texas residents and 12% of the contract employees were Texans; that the payroll office for civil service employees remitted to New Mexico $1,869,904 in 1978 and $461,827 in the first quarter of 1979 for taxes withheld from residents and nonresidents; that the total civilian (and contract but excluding military) payroll at WSMR from October 1, 1978 through March 31, 1979 was $57,771,881 and that the gross earnings of civil service Texans at WSMR for 1978 was $30,658,296.25 (Plaintiffs' Exhibits 11 and 12). From these statistics, a reasonable estimate of appellants' money going to Santa Fe from WSMR annually is in excess of $750,000.00.

In defense of the New Mexico tax laws, the State's answer denied most of the allegations of Plaintiffs' Second Amended Complaint, admitted WSMR was an exclusive federal enclave and that four of the named plaintiffs had made timely and proper claims for refund but which had been validly denied, and asserted that the medical and dental expense credit was in fact credit for related gross receipts taxes paid only by residents, and that the action should not be allowed as one for a class. At the trial of the cause, the State offered Defendants' Exhibits A-E, all of which concerned negotiations between the state and federal governments over War Road II-SR 213, and called two witnesses: a state highway patrolman, from whom some of the facts described above were elicited; and Charles Turpin, an administrative assistant to the Secretary for Taxation and Revenue, a cabinet department in the New Mexico State government, to explain various matters concerning the State's tax laws.

Much of Turpin's testimony was in response to that of Clarence Curl, a Texas resident employed at WSMR testi-

fying for the Plaintiffs and whose 1978 tax return was received in evidence as Plaintiff's Exhibit 14, which showed that $1,950.90 had been withheld from his wages for New Mexico tax, and that after a refund of $1,109.00, a net amount of approximately $800.00 was paid to the State. Curl's position was that he had to file jointly with his wife (employed in Texas) and to report a total income of $52,000.00, 39.97% ($21,177.75) of which was non-New Mexico income, resulting in his paying New Mexico tax on his wife's salary earned in Texas (Tr. 228), which has no income tax. Turpin did not concur with Curl's contention, but conceded that the required inclusion of non-New Mexico income resulted in a 39.97% diminution of the exemptions and deductions which could be claimed on the New Mexico return (Tr. 300, 301, 318, 319). The explanation offered by Turpin was that the various provisions of New Mexico law for allocation and apportionment are in accord with uniform laws adopted by many states but admitted that these statutes were based on the assumption that both states involved had an income tax, and that "the problem is we are talking about a state that doesn't have income tax", (Texas) (Tr. 323).

Turpin also testified concerning the recent decision by the New Mexico Legislature to enact a grocery tax rebate for residents only (§7-2-14.1 NMSA 1978), similar to those on the books for medical and dental expense (§7-2-15 NMSA 1978). Turpin stated the State decided it could return as much as $51 million a year in surplus to taxpayers through the grocery tax rebate (Tr. 288, 311), the justification for limiting it to residents being that gross receipts paid on groceries was more likely paid in New Mexico by resident consumers than by nonresidents, and that administrative convenience justified the figure of $40.00 per exemption (Tr. 284-290) without proof of actual payment of gross receipts taxes by residents. A medical and dental expense credit for $5.00 per exemption is similarly structured.

Although the State made mention for the first time in its reply brief in the Supreme Court of New Mexico, no pleadings

by the State had raised as justification for the tax, nor was any evidence offered by the State in the trial court to establish, that any Texas resident employed at WSMR had ever benefited in any way from State laws, the applicability of which has been extended by Congress to federal enclaves, including general criminal laws of the state (18 U.S.C. §13, Federal Assimilative Crimes Act), workmen's compensation (40 U.S.C. §29), personal injury and wrongful death (16 U.S.C. §457), State unemployment compensation laws (26 U.S.C. §3305), and State fish and game laws (10 U.S.C. §2671), none of which cost the State anything, particularly in view of the fact that the vast majority (86%) of the members of the class are federal civil service employees (for which Congress has enacted its own "workmen's compensation" statute, 5 U.S.C. §8101 et seq., and whose "employer" is exempt from the tax to be paid by other employers into the federally created unemployment compensation fund, 26 U.S.C. §3306(c)(6)). Unemployment benefits paid and even administrative expense incurred by the States are federally reimbursed, see 42 U.S.C. §502. Most if not all of these matters either can, *Stokes v. Adair,* 265 F.2d 662 (4th Cir. 1959) (personal injury), or must, *Bowen v. Johnson,* 306 U.S. 19 (1939) (crimes) be tried in federal courts, either because of jurisdictional problems created by the exclusive federal territory concept or by practical problems created by the cession from the State having reserved only the right to serve process for *off*-reservation conduct. Appellants' reply brief in the New Mexico Supreme Court below objected to the propriety of considering these state laws raised for the first time on appeal, but it would appear that the Court may have considered them as "fruits of civilization." Appellants have included the federal laws which incorporate state laws into federal territory in Appendix "G" hereto, pp. 2g-5g, infra, to demonstrate that Congress has merely adopted these laws rather than pass its own comprehensive civil and criminal codes for such enclaves.

The State did develop testimony concerning accidents on SR 213, and asserted in argument and in its proposed findings

(Tr. 161) that Plaintiffs were afforded access to New Mexico courts and process over nonresidents in the event of an accident or mishap there, and the trial court so found.

The trial court virtually adopted the State's version of proposed findings and conclusions, and ruled that benefits derived from the State consisted of "among others.....the use of state roads 213 and 404 to and from their work; state police answer trouble calls and investigate accidents (in such areas) and provide law enforcement protection in New Mexico; the New Mexico courts are available to them for actions arising in New Mexico and the opportunities to work within New Mexico," and that the "New Mexico State Income Tax bears a reasonable and constitutional relation between the tax imposed upon the Plaintiffs . . and to the benefits and protection afforded by the State of New Mexico to the Plaintiffs," that the State's tax rate is the same for residents and nonresidents alike and "is applied only to income earned in New Mexico," that pursuant to §7-2-19 NMSA 1978, a nonresident is entitled to credit for income taxes paid in his state of residence and that the medical and dental expense and grocery tax credits were rationally allowed to residents only. See Appendix "C", pp. 1c-8c, infra.

The Supreme Court of New Mexico rejected appellants' case for lack of "fiscal relation" by holding that the power to tax rested on less tangible benefits — the "fruits of civilization" (without detailing any) and the opportunity to work in the State, cited *Shaffer v. Carter,* 252 U.S. 37 (1920), for the proposition that exemptions and deductions may be apportioned, and *Baldwin v. Montana Fish & Game Com'n,* 436 U.S. 371 (1978), for the proposition that a rationally related discrimination in favor of residents, which the court found to be present in the medical expense and grocery tax credits, was valid; and found the trial court's error in dismissing the refund actions to be harmless since the basis for the refund itself was without merit.

THE QUESTIONS ARE SUBSTANTIAL

A. FISCAL RELATION

This case presents serious questions as to whether there are *any* limitations on the power of the states to fully tax the personal income of nonresidents who cross over into their borders, regardless of how miniscule the state's contribution or cost is to the production or protection of such income. Beyond settling the broad principles that states may tax nonresidents only on income earned within the state and that they must tax residents and nonresidents on a non-discriminatory basis, this Court has not in recent times, if ever, given clear meaning and content to these holdings, or in a case involving an individual nonresident taxpayer, to the oft-expressed concept that the taxing power exerted by the state must bear "fiscal relation to protection, opportunities and benefits given by the state," *Wisconsin v. J.C. Penney,* 311 U.S. 435 at 444 (1941). The instant case appears to be one for this Court to determine whether there has been such a "gross overreaching" by the State of the individuals and the class taxed as has led to invalidation of state taxation of interstate commercial enterprises, see e.g., *Norfolk and W. Ry. Co. v. Missouri State Tax Com'n.,* 390 U.S. 315 (1968).

To be sure, appellants understand that minor inequalities and hardships are incidents of every system of taxation which do not render the legislation obnoxious to the federal constitution, *Salomon v. State Tax Com'n.,* 278 U.S. 484, 491-92 (1929), and that neither the resident nor nonresident may make a constitutional demand for equivalent or even approximate return in benefits from the state for each tax dollar paid. However, this Court has consistently held in many contexts that the exaction must bear some pecuniary relationship to benefits, protection or opportunities afforded by the state, without which the exaction must fall as being no more than a "tribute" to the state, unrelated to identifiable expenditures or fiscal values attributable to the state such as roads, bridges and schools, *Union Refrigerator Transit Co. v. Kentucky,* 199 U.S. 194 at

202 (1905); police and fire protection, *Michelin Tire Corp. v. Wages,* 423 U.S. 276, 287-290 (1976); or the construction and maintenance of airport facilities, *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.,* 405 U.S. 707, 712 (1972), whether they be an exact or even approximate quid pro quo or not.

The instant decision of the New Mexico Supreme Court seems to proceed on the basis that once a "nexus" is established — here, the employment of appellants within the geographical confines of the State — the tax is valid without regard to how intangible or theoretical alleged benefits may be. Appellants submit that this view of the New Mexico Supreme Court is in serious conflict in principle with the clear delineation of the "fiscal relation" test enunciated in *Wisconsin v. J.C. Penney,* supra, and totally ignores the most recent pronouncements of this Court, which specifically hold that the Due Process Clause of the Fourteenth Amendment imposes *two* requirements for state taxation of interstate business activities: a "minimal connection" or "nexus" *and* the income attributable to the state for tax purposes must be "rationally related to values connected with the taxing state", *Moorman Mfg. Co v. Bair,* 437 U.S. 267 at 272, 273 (1978); *Mobil Oil Corp. v. Comm'r. of Taxes,* 445 U.S. 425 at 436, 437 (1980). Surely, the rights of individuals (appellants and members of the class they represent) are no less protected under the Fourteenth Amendment *and* The Privileges and Immunities Clause.

Merely because appellants are employed within the geographical confines of the State does not validate the tax. The opportunity to work there is afforded by the federal government, which created and acquired WSMR. The status of the Range as an exclusive federal enclave makes it analogous to Indian reservations, which are federally created and protected. This Court has recently held invalid a tax because the State failed to tailor an assessment on motor vehicles to the amount of actual *off*-reservation use, where the taxpayer could be said to be a recipient of State services, *Washington v. Confederated Tribes,* U.S. , 100 S.Ct. 2069 (1980). Even though the

Indian reservation was within the geographical boundaries of the State, the State did not even claim that it could impose the tax upon vehicles used wholly within the reservation due to the decisions of this Court in *McClanahan v. Arizona Tax Com'n.,* 411 U.S. 164 (1973), and *Moe v. Salish and Kootenai Tribes,* 425 U.S. 463 (1976), and the Court rejected its argument that the taxable event was off-reservation use, not ownership on the reservation. The opinion states that use outside the reservation might well be taxable but that the statute was not so tailored, ... U.S. ....., 100 S.Ct. at 2086. That the New Mexico courts hold an opposite view, and that "reservation" status is irrelevant, are apparent from this case and Tiffany Const. Co., Inc. v. Bureau of Revenue, 603 P.2d 332 (N.M. App.), rev'd and remanded, ... U.S. .....,100 S.Ct. 3041 (1980).

If the taxable event here is the use of SR 213, the tax is even less "tailored" than the one struck down in *Confederated Tribes,* supra, as *vehicle* taxes would certainly be more appropriate than an *income* tax to compensate the State for use of roads by nonresidents. Even taxes so tailored cannot be justified by a general desire to raise revenue, when the roads at issue have been built, maintained and policed exclusively by the federal government, *White Mountain Apache Tribe v. Bracker,* ..... U.S. ....., 100 S.Ct. 2578 at 2587 (1980). When this law suit was filed, such were the facts of this case, and New Mexico has since (in 1975) invested only 85¢ to alter the facts with respect to SR 213. Whether or not the State will invest more in the future in maintaining it, without reimbursement from Department of Defense funds, is speculative. As less than 1% of the class use SR 404, which is conceded to be a state built and maintained road, this taxable event, if any, would do no more than create a subclass whose standing would perhaps be less attractive than those using SR 213. Of course, appellants' position is that even users of SR 404 have a right to do so (in exercise of their rights to travel, engage in interstate commerce and to commute to their place of federal employment) without being subjected to the State's tax on their *income* earned at WSMR. Taxation should be based on "fiscal relation", not geographical accidents.

Another "geographical accident", clearly untaxable, is disclosed by the record, in that El Pasoans commuting from downtown to certain residential areas in the city use a road which passes through New Mexico to the extent of 6/10ths of a mile. (Tr. 260). Appellants' perception is that they receive no more of significance *from New Mexico* than do these other untaxed commuting El Pasoans.

New Mexico tax legislation has been the subject of several recent decisions of this Court, reversing the courts in the system from which this case comes and invalidating state taxes under the Commerce Clause, *Evco v. Jones,* 402 U.S. 969 (1971) and 409 U.S. 91 (1972); the Supremacy Clause, *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979); and certain taxes concerning Indian reservations, *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), and apparently *Tiffany Cons. Co., Inc. v. Bureau of Revenue,* ....., U.S. ....., 100 S.Ct. 3041 (1980), a case which bears a striking resemblance to this case, see opinion below in Tiffany at 603 P.2d 332 (N.M. App. 1979). Appellants believe the failure of the New Mexico courts to recognize federal rights is the crux of the problem necessitating appeals to this Court. Instead of the State of New Mexico being the source of benefits which bear a fiscal relation here, the federal government and the Constitution are the source of all that is pecuniarily significant as to these appellants. As nonresidents are not represented in the taxing state's legislative halls, decisions of this Court reflect an "appropriately heightened concern for the integrity of the Privileges and Immunities Clause", *Austin v. New Hampshire,* 420 U.S. 656 at 662, 663 (1975), which compels recognition by this Court of substantial rights conferred by the Constitution and laws of the United States which have been totally ignored by the state courts below. These rights can be put in their proper constitutional context only by review of the entire record and hearing oral argument herein, not merely by reviewing the constitutional "gloss" put on facts by a state district judge. These rights, clearly identified and defined by the decisions of this Court, include:

A. The right to use interstate facilities (a highway crossing state lines) without being required to pay a tax which bears no reasonable relationship to the expense incurred by the provider, *Greyhound Lines v. Brice,* 339 U.S. 542 (1950); and the right to engage in interstate commerce, *Crutcher v. Kentucky,* 141 U.S. 47 (1891);

B. The appellants' right of access to government areas where they are employed, without their being taxed for the exercise of such right, *Crandall v. Nevada,* 6 Wall. 35 (1868);

C. The appellants' right to travel and select their place of residence without being penalized therefor, *Shapiro v. Thompson,* 394 U.S. 618 (1969);

D. A nonresident's right to pursue a livelihood in a state other than his own is a *fundamental* one protected by the Privileges and Immunities Clause, *Baldwin v. Fish Game Com'n.,* 436 U.S. 371 (1978), which case also recognized by quoting the classic statement of Mr. Justice Washington in *Corfield v. Coryell,* 6 F.Cas. 546, 552 (1825), that the right to institute and maintain actions of any kind in the courts of the state was one with which the state could not interfere.

Thus, appellants' jobs on the federal enclave, their right to commute to and from their homes in Texas and their rights to litigate in New Mexico courts flow not from the State of New Mexico but from the federal government and the Constitution. Only with proper recognition of these rights by this Court can a proper answer be given to the "simple but controlling question" posed in *Wisconsin v. J.C. Penney,* supra: "whether *the state* has given anything for which *it* can ask return," 311 U.S. at 444 (emphasis added). The New Mexico Supreme Court termed this inquiry "necessarily incomplete and unpersuasive".

Nothing in the Buck Act, 4 U.S.C. §§104-110, can be deemed to constitutionalize an income tax on nonresidents which is invalid because of their immunity from taxation by a state which affords them no protection or benefits, see *U.S. v. Mississippi Tax Comm'n.,* 421 U.S. 599 (1975), which held that

neither the Buck Act nor the Twenty-first Amendment validated a state's liquor tax, from which the government was immune in its activity on exclusive federal enclaves. The Buck Act merely expresses congressional consent to a proper exercise of power to tax that which would otherwise be suspended by the exclusivity of legislative power conferred by Article 1, §8, Clause 17 upon Congress. The Buck Act cannot repeal the constitutional limits imposed upon the states' power to tax or validate an otherwise constitutionally invalid tax. One court has described the Buck Act as being intended to apply only to residents of federal enclaves, *U.S. v. Lewisburg,* 539 F.2d 301 at 309 (3d Cir. 1976), but others have disagreed, and apply it to nonresidents, e.g., *Kiker v. City of Philadelphia,* 31 A.2d 289 (Pa. 1943) cert. denied, 320 U.S. 741. None of these decisions, even the one by the New Mexico Supreme Court below in this case, take the position that the Buck Act enlarges the States' power to tax; all hold that the effect of the Buck Act is to merely allow the exercise of the State's power to tax within federal enclaves but not in excess of the usual limits otherwise imposed by the Constitution.

B. DIMINUTION OF EXEMPTIONS

Whether this Court's touchstone decision in *Travis v. Yale and Towne Mfg. Co.,* 252 U.S. 60 (1920), can be watered down by a state's allocation and apportionment form pursuant to State law, which requires inclusion of income earned by nonresidents outside the taxing jurisdiction so as to effect a proportional diminution of the exemptions allowed in full to residents, is an important question squarely presented by the facts of this case.

As was shown in the case of Clarence Curl's New Mexico return (Plaintiff's Exhibit 14) and testimony, his wife's salary earned in Texas and other non-New Mexico income brought the total amount required to be reported on their joint return to over $52,000.00, of which 39.97% was earned out of New Mexico. The State's own witness conceded this resulted in di-

minishing the exemptions allowed by New Mexico law (Tr. 300, 301, 318, 319).

The New Mexico Supreme Court brushed the contention aside by citing *Shaffer v. Carter,* 252 U.S. 37 (1920), which does stand for the proposition that *losses* of the nonresident incurred elsewhere need not be allowed, but overlooked the companion case, decided the same day, *Travis v. Yale and Towne Mfg. Co.,* supra, which invalidated a tax system which allowed *exemptions* to residents only.

At least one writer has concluded that "personal exemptions have no relation to . . . the source of (a taxpayer's) income", and construes *Travis* as holding that "a state must afford nonresidents and residents the same personal exemptions," *Solomon,* Nonresident Personal Income Tax: A Comparative Study in Eight States, 29 Fordham L.Rev. 105 at 108 (1960).

The fact that it is based on the assumption that nonresidents will utilize the balance of the exemption in their state of residence when paying taxes there fails in the face of the fact that these nonresidents pay no income tax in their state of residence, and the apparent generosity of extending credits found in §7-2-19 NMSA 1978 is shown to be a cruel hoax when the balance of the statute is read, which makes it clear that such credit is allowed only if a sister state grants similar credits to New Mexicans, which Texas does not do because it has no income tax. The constitutionality of one state's statutes affecting nonresidents cannot depend on the present configuration of the statutes of another state, *Austin v. New Hampshire,* 420 U.S. 656 at 667, 668 (1975).

While it may be true that these Texans are not literally subjected to double taxation in that their state has no income tax, the fact is that these Texans pay all the relevant taxes assessed by both states, and work alongside New Mexico residents and pay the full rate of New Mexico tax for which they receive nothing from the State, except treatment as second class citizens for all other purposes. Their co-workers enjoy the full spectrum of benefits and protection afforded by New Mexico without paying any tax to Texas even though they enjoy the

"fruits of civilization" in Texas when they enter it, but as this creates no meaningful "fiscal relation" with Texas, their income is quite properly immune from taxation in Texas.

The required inclusion of non-New Mexico income (untaxed elsewhere) in the State's allocation and apportionment statutes (§§7-2-11, 7-4-3 & 7-4-21 NMSA 1978) does not appear to have been arrived at by accident or ignorance, but by design, as §7-4-4 NMSA 1978 calls for inclusion of out of state income if the other state "has jurisdiction to subject the taxpayer to a net income tax, regardless of whether the state does or not." As these provisions are found in the laws of most states, this question is one of significance not merely to the parties or to the two states involved here but to most if not all the states, which can properly be resolved only by this Court.

C. MEDICAL AND DENTAL EXPENSE AND GROCERY TAX REBATE

If the record did not disclose such cynical abuse of the State's power to tax nonresidents to whom it affords no protection, benefits or opportunities, the return of gross receipts to residents only might in and of itself be innocuous, but where the state puts $750,000 annually of appellants' money in its coffers at an expense of 85¢ over 30 years, and then decides it can afford to return $51 million annually to residents only, the situation calls for meaningful judicial scrutiny from the only remaining source under our system of judicial review— this Court.

Appellants concede the rationality of returning to residents only the amount *actually spent* in New Mexico by them for groceries and medical expenses due to the State's gross receipts tax, but does not believe that denial of the minimum amount ($40.00 and $5.00 per exemption, respectively) to nonresidents passes constitutional muster, as it involves an irrebutable presumption that no tax paying nonresident, whether Texans employed at WSMR or not, ever buys groceries or incurs medical expenses in the state upon which the gross receipt tax is levied, which is not a proven or provable fact, rendering such irrebutable presumption violative of due process, *Tot v. U.S.*, 319

U.S. 463 (1943), and equal protection. (§§7-2-14.1, 7-2-15 NMSA 1978).

D. EXHAUSTION OF ADMINISTRATIVE REMEDIES

The State has candidly conceded error on the part of the district court in dismissing the refund action as to 4 of the 5 named individual plaintiffs, as it had properly admitted in its Answer (Tr. 135) that those individual plaintiffs had done everything required by New Mexico law at the administrative level by making timely and proper claims for refund, which had been denied and that suit had thereafter been filed within 30 days, see §7-1-26 NMSA 1978. The State did not concede that the class had done so, even though demand for refund for the class was made in the same letter covering the individual taxpayers (Plaintiffs' Exhibit 8), and which was rejected at the same time the individuals' claims were denied by the defendant-appellee O'Cheskey (Plaintiffs' Exhibit 9). Apparently, the reason for the rejection of the letter as a claim for refund for the class is based on the absence of any provision in New Mexico's tax laws for handling a class of taxpayers, with the exception of one which authorizes the granting of an extension of time to a "class of taxpayers", §7-1-13 NMSA 1978. In any event, the district court dismissed the refund action in its entirety, as to both the individuals and the class "due to a failure to exhaust administrative remedies", (Tr. 129) see Appendix "B", p. 1b, infra.

In addition to alleging exhaustion of administrative remedies prior to filing suit, appellants' original and amended complaints alleged that resort to same was unnecessary under 42 U.S.C. §1983. This Court has recognized that resort to the courts may be had without exhaustion of administrative remedies, *King v. Smith,* 392 U.S. 309, 312 (1960); *Wilwording v. Swenson,* 404 U.S. 249 (1971); *Steffel v. Thompson,* 415, U.S. 452 (1974), particularly where to compel resort to administrative remedy would be to demand a futile act, *Houghton v. Shaffer,* 392 U.S. 639 at 640 (1968). Here, the former director

of the State's Bureau of Revenue had stipulated in the prior federal court litigation between the parties that refunds would be denied Texas residents employed at WSMR on their constitutional claims no matter what procedure they followed administratively, a fact alleged in plaintiffs' original complaint, accompanied by attachment of the stipulation to plaintiffs' second amended complaint (Tr. 65).

The State previously stated to this Court (in an effort to convince it that New Mexico's remedies were plain, speedy and efficient in the context of the anti-injunction statute, 28 U.S.C. §1341) that "the Appellants could *today* institute a *single* claim for all taxes paid for the years 1969, 1970, 1971 and 1972 . . ." (appeal administrative denials through the State's courts and to this court) . . . If the litigation were successful, the Appellants could, as late as December 31, 1975, claim a refund of taxes paid for the tax year 1971 with no requirement that they make claims or protest of any kind in the interim," (see p. 17 of Motion To Dismiss By Appellee O'Cheskey in Lung v. O'Cheskey, No. 73-76 on the docket of this Court.)

All of this seems to imply that a class action could be had, but which is cast in doubt by further language in Appellee's Motion To Affirm in this Court which refers to a single "taxpayer" applying for refunds after a "single test suit," implying that no class action suit for refunds could be had. Appellants' position is that a class action is the only proper vehicle for the single test suit, not multiple actions by members of the class. The monetary difference to the class is considerable in view of the fact that the refund for the class for each year is in the hundreds of thousands of dollars.

The opinion of the New Mexico Supreme Court attempts to avoid the federal issue raised before it (concerning 1983 actions eliminating resort to administrative action) by holding the error harmless, but this Court has recognized that "the question of when and how defaults in compliance with state procedural rules can preclude our consideration of the federal question is itself a federal question," *Henry v. Mississippi,* 379

U.S. 443 at 447 (1975). If the highest state's courts refusal to deal with a federal question is a mere evasion, this Court's jurisdiction can be asserted, see *Rogers v. Alabama,* 192 U.S. 226, 230, 231 (1904).

Appellants recognize that this question does not appear to fall within the Court's appellate jurisdiction, as the claim by Plaintiffs below was not that the lack of provision for class action refund relief rendered the New Mexico procedures unconstitutional, but that compliance had been had with whatever procedures were provided, and that resort to those at the administrative level was unnecessary and futile in any event under the principles of 42 U.S.C. §1983. Nevertheless, appellants believe the issue is of sufficient merit to warrant this Court granting certiorari on this issue, in conjunction with those over which the Court has appellate jurisdiction, see *Cox Broadcasting v. Cohen,* 420 U.S. 469 at 487n 14 (1975); *Prudential Insurance Co. v. Cheek,* 259 U.S. 530 at 547 (1922); and *Gomez v. Perez,* 409 U.S. 535n 2 (1973).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this Appeal, or alternatively, issue a writ of certiorari to the New Mexico Supreme Court.

Respectfully submitted,

Of Counsel:
John P. Otto
45 W. Jefferson
Phoenix, Arizona

By: .....
FRED J. MORTON
Attorney for Appellants
210 N. Campbell
El Paso, Texas 79901
(915) 532-3601

CERTIFICATE OF SERVICE

This is to certify that on the 2nd day of January, 1981, I, FRED J. MORTON, a member of the bar of the Supreme Court of the United States, mailed, postage prepaid, three copies of the foregoing Jurisdictional Statement to the Honorable Jeff Bingaman, Attorney General of the State of New Mexico, P. O. Drawer 1508, Bataan Memorial Building, Santa Fe, New Mexico 87503, and to Ms. Sarah Bennett, Assistant Attorney General, Taxation and Revenue Department of the State of New Mexico, P. O. Box 630, Santa Fe, New Mexico 87509, Attorneys for Appellees. I further certify that all parties required to be served have been served.

Fred J. Morton

FRED J. MORTON

APPENDIX "A"

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

(FILED OCTOBER 8, 1980)

No. 12,780

LAWRENCE LUNG, et al.,

Plaintiffs-Appellants,

vs.

FRED L. O'CHESKEY, et al.,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT
OF SANTA FE COUNTY

Thomas A. Donnelly,
District Judge

Calhoun, Morton, Deason & Preslar
Fred J. Morton
Charles A. Deason, Jr.
El Paso, Texas
John P. Otto
Phoenix, Arizona

Attorneys for Plaintiffs-Appellants

Jeff Bingaman, Attorney General
Sarah Bennett, Assistant Attorney General
Santa Fe, New Mexico

Attorneys for Defendants-Appellees

OPINION

SOSA, Chief Justice

This action was begun in the district court of Santa Fe County. Plaintiffs are Texas residents and employees of the federal enclave known as White Sands Missile Range. They brought suit individually and as a class alleging that the New Mexico Income Tax is unconstitutional as applied to them, and seeking declaratory and injunctive relief, as well as a refund of monies already paid. The trial court dismissed the third claim by interlocutory order for failure to exhaust administrative remedies. The other two claims were tried to the court without a jury, and judgment was entered denying all relief. Plaintiffs appeal this judgment and we affirm.

Four attacks are made on the constitutionality of the New Mexico income tax as applied to these plaintiffs. First, it is contented that the tax fails because these taxpayers do not get enough for their money; there is not a sufficient "fiscal relation" between them and the State of New Mexico. *See Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940). In support of this, plaintiffs present evidence that New Mexico has in fact spent very little money on their behalf. We find such an inquiry necessarily incomplete and unpersuasive. The power to tax does not rest on a measurable economic duty of the State toward its citizens, but on less tangible benefits, on the "fruits of civilization." *J. C. Penney Co.*, at 466, quoting *Compañia de Tobacos v. Collector,* 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). The opportunity to exercise "intelligence, skill, and labor while employed in the State of New Mexico" has been held to be sufficient benefit to support an income tax. *Jackling v. State Tax Commission,* 40 N.M. 241, 248, 58 P.2d 1167, 1171 (1936). Under this test, plaintiffs have a sufficient nexus with New Mexico to be taxed.

Plaintiffs' second argument is that they are discriminated against by the New Mexico allocation and apportionment procedure for residents of Texas with New Mexico income. New Mexico only grants plaintiffs a percentage of New Mexico deductions and exemptions according to how much of the total

income was earned in this state, relying on the state of residence to allow the corresponding percentage of deductions and exemptions to bring the total deductions to 100% of those allowed. Since Texas has no income tax, this reliance fails, and plaintiffs assert their claim that the loss of some portion of their New Mexico deductions amounts in effect to a tax on their out-of-state income, or to arbitrary discrimination against them as non-residents.

The State argues that the tax is not discriminatory and that non-residents pay income tax at the same rate as residents. It argues further that even if the effect of the New Mexico Income Tax Act is to apportion exemptions and deductions in relation to the amount of total income earned within the state, such a provision is constitutionally permissible. We agree. It is clear that a state may tax income produced in that state by a non-resident. *Shaffer v. Carter,* 252 U.S. 37 (1920). It is equally clear that a state may not tax the income of a non-resident which is not produced in the state. It follows that a state need only accord deductions and exemptions to non-residents for the portion of their income which is earned from within the state. If the state has no jurisdiction to tax the income from a particular source, there is no reason for it to extend exemptions and deductions to a non-resident based on that income. *See Shaffer v. Carter.* The reason a state may give a resident full deductions and exemptions even though a portion of his income is earned outside the state is that the state has the power to tax all the income of the resident, wherever earned. *Id.* We find no discriminatory taxing scheme under these facts.

Plaintiffs' third objection to the application of this tax, that the state cannot tax within a federal enclave such as White Sands Missile Range, is refuted by the express language of the Buck Act, 4 U.S.C. §§106-110 (1977). This act provides that:

> No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such

> a tax, by reason of his residing within a federal area or receiving income from transactions occurring on services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any federal area within such State to the same extent as though such area were not a federal area.

The argument that this Act only permitted taxes in effect the year it was passed, and not any subsequent ones, was rejected by this Court in *Burns v. State Bureau of Revenue, Income Tax Div.*, 79 N.M. 53, 439, P.2d 702 (1968), *cert. denied,* 393 U.S. 841 (1968).

The final attack on the New Mexico tax structure as applied to these plaintiffs concerns a program of grocery and medical rebates given to New Mexico residents. Appellants claim that a refusal to grant them these rebates purely on the grounds of their non-resident status violates the Privileges and Immunities Clause of the United States Constitution. We disagree. A state is not forbidden to make distinctions between residents and non-residents if they are rationally related to a legitimate state interest. *Baldwin v. Montana Fish & Game Comm'n.*, 436 U.S. 371 (1978). As the trial court found, the state interest in this case is to grant relief from gross receipts and property taxes to low-income individuals who actually pay those taxes. The legislature could reasonably believe that non-residents of this state do not actually pay these taxes; a rebate given to them would not afford relief for monies exacted by New Mexico. Therefore, the distinction between residents and non-residents is rationally related to a legitimate state purpose, and can be permitted to stand.

That part of plaintiffs' appeal which assigns error on procedural grounds fails under our decision on the merits. The trial court's error in granting a motion not made by defendants was entirely harmless, as it simply resulted in a second amended complaint. The dismissal of that part of the case which concerns the refund of taxes already paid was also harmless error in view of the final outcome of the case. Since those issues which would have been litigated under the last claim are pre-

cisely the same as those which are here affirmed, they are not prejudiced by the loss of a claim for relief.

The judgment is hereby affirmed.

s/Dan Sosa, Jr.
DAN SOSA, JR., Chief Justice

WE CONCUR:

s/Mack Easley
MACK EASLEY, Justice

s/H. Vern Payne
H. VERN PAYNE, Justice

APPENDIX "B"

IN THE
DISTRICT COURT OF
SANTA FE COUNTY, NEW MEXICO
FIRST JUDICIAL DISTRICT

Civil Action
No. 47,222

LAWRENCE LUNG, MELVIN D. DELANO, OSCAR H. CALDERON, FERNANDO FUENTES and JERRY L. TENISON, on behalf of Themselves and Other Persons Similarly Situated in the Same Class and Classes of Persons, and TEXAS ASSOCIATION ON NEW MEXICO INCOME TAX, an Unincorporated Association, on Behalf of Itself, Its Members and Other Persons Who Have Been and Will Be Similarly Situated in the Same Class or Classes of Persons,

Plaintiffs,

v.

FRED L. O'CHESKEY, Individually, and in His Capacity as Director, Bureau of Revenue of the State of New Mexico and His Successors in Office, HON. BRUCE KING, Individually, and in His Capacity as Governor of the State of New Mexico, and His Successors in Office, and the STATE OF NEW MEXICO,

Defendants.

ORDER

The Court having taken under advisement the Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint, and having reviewed the pleadings and attachments, motion, applicable law and other matters properly before the Court, and the Court being of the opinion that Plaintiffs' Second Amended Complaint does state a cause of action which entitles Plaintiffs to a trial thereon insofar as the complaint al-

leges a constitutional issue concerning the legality of income tax assessments by the State of New Mexico as to the Plaintiffs; and the Court being of the further opinion that Defendant's Motion to Dismiss should be granted as to allegations asserted which seek a refund of the New Mexico State Income Tax and a class action for refunds, due to a failure to exhaust administrative remedies for such refunds;

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Motion to Dismiss filed by the Defendant Bureau of Revenue, State of New Mexico, be, and the same is hereby, denied in part and sustained in part as follows:

Defendant's Motion to Dismiss is hereby granted as to the allegations in Plaintiffs' Second Amended Complaint which seek a refund of the New Mexico State Income Tax and a class action for refunds, due to a failure to exhaust administrative remedies for such refunds;

Defendant's Motion to Dismiss is hereby denied, and Plaintiffs are entitled under their Second Amended Complaint to be heard on the merits, as to the issues of whether injunctive relief should be granted, and to a declaratory judgment on the issue of the alleged unconstitutional application of New Mexico laws relating to Plaintiffs and others similarly situated.

ENTERED this 20th day of April, 1979.

s/Thomas A. Donnelly
THOMAS A. DONNELLY
District Judge

APPROVED AS TO FORM:

s/Fred J. Morton
FRED J. MORTON
Attorney at Law
Counsel for Plaintiffs

s/Sarah Bennett
SARAH BENNETT
Special Assistant Attorney General
Counsel for Defendants

APPENDIX "C"

IN THE
DISTRICT COURT OF
THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

No. SF 47222

LAWRENCE LUNG, et al.,

Plaintiffs,

vs.

FRED L. O'CHESKEY, individually, and in his capacity as Director, Bureau of Revenue of the State of New Mexico; and HONORABLE BRUCE KING individually and in his capacity as Governor of the State of New Mexico, and the STATE OF NEW MEXICO,

Defendants.

DECISION OF THE COURT

The Court having heard the evidence and the testimony and the arguments of Counsel, and having considered the Requested Findings of Fact and Conclusions of Law, now renders the following decision:

FINDINGS OF FACT

1. The Plaintiff, Lawrence Lung, Melvin D. Delano, Oscar H. Calderon, Fernando Fuentes, and Jerry L. Tenison and others similarly situated, are residents of the State of Texas, and are employed at the White Sands Missile Range, a federal enclave located in the State of New Mexico.

2. The Defendant, Fred L. O'Cheskey, is the former Director of the Bureau of Revenue of the State of New Mexico; the Defendant O'Cheskey has been replaced in his position as Director of the Bureau of Revenue, by Fred Muñiz, who now serves in such capacity, and Fred Muñiz should be substituted

pursuant to Rule 25 (d), Rules of Civil Procedure for the Defendant O'Cheskey in his official capacity.

3. The Defendant, Bruce King, is the Governor of the State of New Mexico.

4. The Defendant, Bureau of Revenue, is a State agency duly constituted by law to enforce and administer the tax laws of the State of New Mexico, and to collect State income taxes.

5. The Plaintiffs are each residents of the State of Texas, and all commute daily from their homes to their place of employment at White Sands Missile Range located within the State of New Mexico. Each of the Plaintiffs pay New Mexico State income taxes on the money earned by them within New Mexico at the White Sands Missile Range.

6. The Plaintiffs listed in Finding of Fact No. 1, supra have brought this action on behalf of themselves and others similarly situated as a class action suit pursuant to Rule 23, Rules of Civil Procedure of the State of New Mexico.

7. The class action suit brought by the Plaintiffs complies with Rule 23, Rules of Civil Procedure, regarding the bringing of class actions and (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact and law common to the class; (3) the claims of the representative parties are typical of the claims of the class; and (4) the representative parties will fairly and adequately protect the interest of the class; and each of the requisites of Rule 23 has been complied with.

8. The Plaintiffs and others similarly situated have been since 1964 and are now, paying New Mexico State income tax on earnings from their civilian employment at White Sands Missile Range which tax is withheld from their salaries by their employers and remitted to the State of New Mexico.

9. The Plaintiffs and others similarly situated receive and derive benefits from the State of New Mexico, consisting of among others, the use of State Road 213, to and from their work; the use of State Road 404, to and from their work; New Mexico State Police answer trouble calls and investigate accidents along the State Road 213, 404 and surrounding areas,

and provide law enforcement protection in New Mexico; the New Mexico courts are available to them for actions arising in New Mexico and the opportunities to work within New Mexico.

10. State Road 213 is a main access route for the Plaintiffs from El Paso, Texas, where most of the Plaintiffs reside, to White Sands Missile Range, where Plaintiffs work daily. State Road 213 is within the borders of the State of New Mexico and is owned and maintained by the State of New Mexico.

11. Some of the Plaintiffs also utilize the Anthony Gap Road (State Road 404) which was created by and has always been maintained by the State of New Mexico, and such road is within New Mexico boundaries.

12. New Mexico State Police with other law enforcement agencies of the State of New Mexico and County of Dona Ana are available to extend protection, enforce State laws, and answer trouble calls and investigate accidents occurring on State Road 213 and immediate areas, between White Sands Missile Range boundaries and the border of the State of Texas.

13. Within the State of New Mexico and between the border of White Sands Missile Range and the Texas border, New Mexico laws govern. Plaintiffs have available to them the use of New Mexico State courts in the event of traffic accidents occurring or other mishap on State Road 213, and Plaintiffs have available to them the use of New Mexico's judicial process arising out of matters relating to their presence in working or commuting to and from the State of New Mexico.

14. The statutory rate for taxing income by the State of New Mexico upon income earned in New Mexico, remains the same whether applied to residents or non-residents, and is applied only to income earned in New Mexico.

15. The low-income State and local tax rebate is only available under New Mexico law to an individual who has actually resided in New Mexico for at least six months and who was not a resident of a public institution for six months of the rebate year.

16. The low-income State and local tax rebate under Sec.

7-2-14 N.M.S.A., 1978, was enacted for the purpose of relieving the regressive nature of State and local taxes, and provides refunds to certain qualified low-income individuals.

17. The six month residency requirement of the low-income tax credit law of New Mexico is a reasonable criteria designed to insure that the recipient of the rebate has actually paid the taxes for which the relief is intended.

18. The State of New Mexico has an interest in granting relief from gross receipts and property taxes to low-income individuals who actually pay those taxes.

19. None of the Plaintiffs have offered evidence that any of them qualified for low-income State and local tax rebates, even if they had been residents.

20. There is no relationship between the New Mexico low-income State and local tax rebate and the New Mexico State income tax, except that the same form is used for efficiency and economy to report one's income and to claim the low-income State and local tax rebate.

21. The medical and dental tax refund under Sec. 7-2-15 N.M.S.A., 1978, is only available to an individual who has actually resided in New Mexico for at least six months and who has not been a resident of a public institution for six months or more of the rebate year.

22. The refund or option to claim 4% of medical expenses is calculated to refund to actual consumers the approximate amount actually paid in passed-on gross receipts taxes.

23. The effect of the medical and dental tax rebate to the claimant is essentially the same as the effect of granting a gross receipts tax exemption for medical and dental services. Both further the State's legitimate interest in providing tax relief in respect to necessity items.

24. The Plaintiffs obtain the majority of their medical services and dental services in the State of Texas, and therefore pay no New Mexico gross receipts tax on those services. None of the Plaintiffs have proven that they in fact paid gross receipts tax on medical or dental services and have no standing to challenge such law's provision.

25. The medical and dental tax rebate has no relation to New Mexico's income tax except that the same form is used to report income to claim the rebate. The same form is used merely for the purpose of administrative economy and efficiency.

26. The medical and dental tax rebate is payable whether or not a claimant has any reportable income.

27. The food tax rebate, under Sec. 7-2-14.1 N.M.S.A., 1978, was enacted to provide a food tax credit against personal income tax for gross receipts taxes paid on food purchases and such rebate can be claimed only by an individual who actually resided in New Mexico for at least six months and who was not a resident of a public institution for six months during the rebate year.

28. The purpose of the rebate for food tax is to refund to those individuals who actually bear the burden of the gross receipts tax on groceries, the approximate amount of taxes which they have paid.

29. The rebate allowed by the Food Tax Credit Act (Sec. 7-2-14.1 N.M.S.A., 1978), is calculated to refund to actual consumers the aproximate amount actually paid in by "passed-on" gross receipts taxes for groceries.

30. The effect of the grocery tax rebate to the claimant is essentially the same as the effect of granting a gross receipts tax exemption for groceries. Both further the State's legitimate interest in providing tax relief in respect to necessity items.

31. None of the Plaintiffs have proven that they in fact paid gross receipts tax on food and have no standing to challenge such law's provisions.

32. The grocery or food tax rebate has no direct relation to the New Mexico State income tax the same form is used to report income and to request a rebate for administrative economy and efficiency one form is used.

33. The Plaintiffs have not sued the agencies responsible for college tuition and State of New Mexico hunting and fishing license fees, so the issue of constitutionality of differing treatment of residents and non-residents in the areas of college tuition rates and hunting and fishing license fees is not before the Court.

34. The fact that New Mexico residents receive lower rates for college tuition fees and for hunting and fishing license fees than non-residents, has no relation to the question of the constitutionality of the New Mexico Income Tax Act.

35. White Sands Missile Range is a federal enclave, ceded by New Mexico to the federal government by Laws 1941, Ch. 8, Sec. 1, (Sec. 19-2-8 N.M.S.A. 1978) and the range is entirely within the borders of the State of New Mexico.

36. The Plaintiffs, and others similarly situated are taxed only on their income earned entirely within New Mexico.

37. The New Mexico State income tax is essentially unrelated to the rebates listed above, or to tuition fees or hunting and fishing license fees.

38. The New Mexico State income tax is imposed at the same rate on the income of residents and on the income of non-residents from New Mexico sources.

39. With respect to non-residents of New Mexico, the tax is only imposed on that income earned within New Mexico.

40. Section 7-2-19 N.M.S.A., 1978, provides that whenever a non-resident individual, taxable under the New Mexico Income Tax Act has become liable for income tax to the State where he resides upon his net income for the taxable year derived from sources in New Mexico, the amount of income tax payable by him in New Mexico shall be credited with such proportion of the tax payable by him in the State where he resides.

41. An actual and justifiable controversy exists between the parties, and Plaintiffs and others similarly situated, and the Plaintiffs are entitled to declaratory judgment relief declaring the rights of the parties.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties hereto and the subject matter hereof.

2. The Plaintiffs herein and others similarly situated receive benefits justifying the application to them of the New Mexico State income tax.

3. The New Mexico State income tax as it is applied to the Plaintiffs, and others similarly situated, and who reside in the State of Texas and commute to their employment at White Sands Missile Range, is a fair and lawful tax, and is rationally related to the benefits provided by the State of New Mexico, and does not violate the due process, equal protection clauses, or other provisions of the Constitution of the United States or State of New Mexico.

4. The New Mexico income tax is non-discriminatory insofar as it applies to the Plaintiffs, and others similarly situated.

5. The New Mexico State income tax bears a reasonable and constitutional relation between the tax imposed upon the Plaintiffs and others similarly situated and to the benefits and protection afforded by the State of New Mexico to Plaintiffs and others similarly situated.

6. The Plaintiffs and others similarly situated have not established that they have standing to challenge the low-income State and local tax rebate.

7. The medical and dental rebate, and the food tax rebate are lawful provisions of New Mexico law and the Plaintiffs and others similarly situated have not established the Plaintiffs or others similarly situated are prejudiced thereby or treated discriminatorily thereby.

8. The rebates established by New Mexico law for medical and dental services, food tax and low-income, are not directly related to the New Mexico income tax law, and are severable.

9. The validity of the income tax structure in New Mexico is not affected in any way by the fact that residents of this State enjoy lower tuition rates and hunting and fishing license fees than non-residents.

10. The provisions of federal law, 4 U.S.C., Sec. 106(A) (Buck Act) confers upon the State of New Mexico, jurisdiction to tax income earned at White Sands Missile Range.

11. The New Mexico State income tax does not abridge the rights of the Plaintiffs to engage in interstate commerce, to travel, or to engage in business, or their rights to privileges and immunities of citizens.

12. The Plaintiffs are not subject to multiple taxation.

13. The State of New Mexico has lawful authority and jurisdiction to impose and collect State income taxes from the Plaintiffs and others similarly situated, and who are employed at White Sands Missile Range.

14. This action is properly brought as a class action within the scope of Rule 23, Rules of Civil Procedure, and notice furnished to members of the class has been adequate to bind all members by the judgment to be entered herein, except as to those persons who opt out by filing the Request for Exclusion form.

15. The claims of the Plaintiffs herein, and others similarly situated, should be denied.

All Requested Findings of Fact and Conclusions of Law of the parties, inconsistent with those found or which are not adopted by the Court above, are denied.

LET JUDGMENT BE ENTERED ACCORDINGLY.

s/Thomas A. Donnelly
THOMAS A. DONNELLY
District Judge

Filed: August 28, 1979

APPENDIX "D"

STATE OF NEW MEXICO
COUNTY OF SANTA FE
IN THE
DISTRICT COURT

No. SF 47222

LAWRENCE LUNG, et al.,
Plaintiffs,

vs.

FRED L. O'CHESKEY, et al.,
Defendants.

JUDGMENT

This matter having come before the Court for trial on the merits, and the Court having heard all evidence and being otherwise fully advised and having rendered interim orders and a final decision disposing all matters,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiffs take nothing and that the action be dismissed on the merits, all in accordance with the decision rendered.

s/Thomas A. Donnelly
DISTRICT JUDGE

Reviewed by:

s/Sarah Bennett
SARAH BENNETT
Attorney for Defendants

Filed: September 29, 1979

s/Fred J. Morton
FRED J. MORTON
Attorney for Plaintiffs

APPENDIX E
(JUDGMENT)

No. 12,780

IN THE
SUPREME COURT
OF THE STATE OF NEW MEXICO

WEDNESDAY, OCTOBER 8, 1980

LAWRENCE LUNG, et al.,

Plaintiffs-Appellants,

vs.

FRED L. O'CHESKEY, et al.,

Defendants-Appellees.

This cause having heretofore been argued, submitted and taken under advisement, and the Court being sufficiently advised announces its decision by Mr. Chief Justice Sosa, Mr. Justice Easley and Mr. Justice Payne concurring, affirming the judgment of the District Court for the reasons given in the opinion of the Court on file;

NOW, THEREFORE, IT IS ORDERED that the judgment of the District Court in and for the County of Santa Fe, whence this cause came into this Court, be and the same is hereby affirmed, and the cause be and the same is hereby remanded to the said District Court of Santa Fe County for such further proceedings therein as may be proper, if any, consistent and in conformity with said opinion and this judgment.

APPENDIX "F"

IN THE
SUPREME COURT OF
THE STATE OF NEW MEXICO

(FILED DECEMBER 1, 1980)

No. 12,780

LAWRENCE LUNG, et al.,
Plaintiffs-Appellants,

v.

FRED L. O'CHESKEY, et al.,
Defendants-Appellees.

NOTICE OF APPEAL TO
THE SUPREME COURT OF THE UNITED STATES:

Notice is hereby given that LAWRENCE LUNG, et al., Appellants herein, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New Mexico, affirming the dismissal of the action, entered in this action on the 8th day of October, 1980.

This Appeal is taken pursuant to 28 U.S.C. Section 1257 (2).

CALHOUN, MORTON, DEASON & PRESLAR
210 North Campbell Street
El Paso, Texas 79901
(915) 532-3601

By: s/Fred J. Morton
FRED J. MORTON,
Attorneys for Appellants

Of Counsel:
JOHN P. OTTO
Luhrs Tower
45 West Jefferson
Phoenix, Arizona
(602) 252-7461

PROOF OF SERVICE

This is to certify that on this 24th day of November, 1980, I, FRED J. MORTON, a member of the Bar of the Supreme Court of the United States, mailed, postage prepaid, a copy of the foregoing to the HONORABLE JEFF BINGAMAN, Attorney General of the State of New Mexico, P. O. Drawer 1508, Bataan Memorial Building, Santa Fe, New Mexico 87503, and to Ms. SARAH BENNETT, Assistant Attorney General, Taxation and Revenue Department of the State of New Mexico, P. O. Box 630, Santa Fe, New Mexico 87509, Attorneys for Appellees. I further certify that all parties required to be served have been served.

s/Fred J. Morton
FRED J. MORTON

Copy filed in District Court, Santa Fe County, New Mexico, on December 1, 1980.

APPENDIX "G"

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. UNITED STATES CONSTITUTION

1. Article I, §8, Cl. 3 (Commerce Clause) provides:

"The Congress shall have Power . . . To regulate Commerce . . . among the several States, and with the Indian Tribes."

2. Article I, §8, Cl. 17 (Exclusive Legislation Clause) provides:

"The Congress shall have Power . . . To exercise exclusive Legislation in all Cases whatsoever . . . over all Places purchased by the Consent of the Legislature of the State in which the same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings."

3. Article IV, §2, (Privileges and Immunities Clause) provides:

"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

4. Article VI, Cl. 2 (Supremacy Clause) provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

5. Fourteenth Amendment, §1, provides:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

6. Twenty-First Amendment, provides:

"§1. The eighteenth article of amendment to The Constitution of the United States (Prohibition) is hereby repealed. §2 The transportation or importation into any state, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

B. STATUTES

1. 4 U.S.C. §§104-110 (Buck Act) provides:

"No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing with a federal area or receiving income from transactions occurring or services performed in such areas; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area," 4 U.S.C. §106(a).

"The provisions of Sections 105 to 110 of this Title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area." 4 U.S.C. §108.

2. 5 U.S.C. §8101 et seq. (Federal Employees Compensation Act) provides:

"The United States shall pay compensation for the disability or death of an employee (of the United States) resulting from personal injury sustained while in the performance of his duty . . . ", 5 U.S.C. §8102(a).

3. 10 U.S.C. §2671 (State hunting and fishing laws on military reservations) provides:

"A secretary of defense shall, with respect to each military installation or facility under the jurisdiction of any military department in a State . . . require that all hunting, fishing and trapping at that installation or facility be in accordance wih the fish and game laws of the State in which it is located."

4. 16 U.S.C. §457 (State wrongful death and personal injury laws in federal areas) provides:

"In the case of the death of any person by the neglect or wrongful act of another within a place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place under which the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be."

5. 18 U.S.C. §13 (State criminal law for federal areas) provides:

"However within or upon any of the places now existing or hereafter reserved or acquired as provided in §7 of this Title (lands under the exclusive or concurrent jurisdiction of the United States) is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which such place is situated, by the laws thereof enforced at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment."

6. 26 U.S.C. §3305(d) (Unemployment compensation laws in federal property) provides:

"No person shall be relieved from compliance with a state unemployment compensation law on the grounds that services

were performed on land or premises owned, held, or possessed by the United States, and any state shall have full jurisdiction and power of enforce the provisions of such law to the same extent and with the same effect as though such place were not owned, held or possessed by the United States."

7. 26 U.S.C. §3306(c)(6) (Exempt from unemployment tax) provides:

"For purposes of this chapter, the term "employment" means any service . . . except service performed in the employ of the United States government or of an instrumentality of the United States which is wholly or partially owned by the United States . . ."

8. 28 U.S.C. §1341 (Anti-Injunction) provides:

"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State"

9. 40 U.S.C. §290 (State workmen's compensation in federal areas) provides:

"Whatsoever constituted authority of each of the several States is charged with enforcement of and requiring compliances with the State workmen's compensation laws of such States and the enforcement of and requiring compliance with the orders, decisions, and awards of said constituted authority of said States hereafter shall have the power and authority to apply such laws to all lands and premises owned or held by the United States of America by deed or act of cession, by purchase or otherwise, which is within the exterior boundaries of any State, and to all projects, buildings, constructions, improvements, and property belonging to the United States of America, which is within the exterior boundaries of any State, in the same and to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be. For the pur-

pose set out in Section 1 of this Act, the United States of America hereby vests in the several States within whose exterior boundaries such place may be, insofar as the enforcement of State workmen's compensation laws are affected, the right, power, and authority aforesaid; provided, however, that by the passage of this Act the United States of America in no way relinquish its jurisdiction for any purpose over the property named, with the exemption of extending to the several States within whose exterior boundaries such place may be only the powers above enumerated relating to the enforcement of their State workmen's compensation laws as herein designated; Provided further, That nothing in this Act shall be construed to modify or amend the Federal Employees Compensation Act as amended from time to time, 5 U.S.C. §§8101 et seq."

10. 42 U.S.C. §502 (Reimbursement of state for administrative expense of unemployment compensation laws) provides:

"The secretary of labor shall from time to time certify to the secretary of the treasury for payment to each State which has an unemployment compensation law approved by the secretary of labor under the federal unemployment tax act, such amounts as the secretary of labor determines to be necessary for the proper and efficient administration of such law during the fiscal year for which such payment is to be made . . . "

11. 42 U.S.C. §1983 (Civil Rights Act of 1871) provides:

"Every person who, under color of every statute, ordinance, regulation, custom or usage of any State, subjects, or causes to be subjected, any citizen of the United States or other persons in the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for regress."

C. NEW MEXICO STATUTES

1. §7-1-13 NMSA 1978 (Extension of time for class of taxpayers) provides:

"The director may, for good cause, extend in favor of a taxpayer or a class of taxpayers, for no more than a total of twelve months, the date on which payment of any tax is required or on which any returned required by provision of the Tax Administration Act must be filed, but no extension shall prevent the accrual of interest as otherwise provided by law."

2. §7-1-26 NMSA 1978 (Claim for refund) provides:

"A. If any person believes that he had made payment of, or had withheld from him, any tax in excess of that for which he was liable, he may claim a refund thereof by directing to the director, within the time limited by the provisions of subsection B of this section, a written claim for refund. Every claim for refund shall state the nature of the person's complaint and the affirmative relief requested . . . The director of his delegate may allow the claim in whole or in part or may deny the claim. If the claim is denied in whole or in part in writing, or if no action is taken on the claim, the person may . . . (2) commence a civil action within 30 days after the denial by the director in whole or in part of a written claim for refund, within 30 days after the expiration of 120 days after the mailing of a claim for refund on which no action was taken by the director, or within the time limited by provisions of subsection B of this section, whichever expires later, in the District Court for Santa Fe County, by filing a complaint setting forth the circumstances of the claimed overpayment, alleging that on account thereof the State is indebted to the plaintiff in the amount stated, together with any interest allowable, demanding the refund to him of that amount and reciting the facts of the claim for refund.

B. . . . No credit or refund of any amount paid to the division may be allowed or made to any person unless as a result of a claim therefor made by him as provided in this section within 3 years of the end of the calendar year in which . . . payment was due."

3. §7-2-3 NMSA 1978 (State income tax) provides:

"A tax is hereby imposed at the rates specified in Sections 5 and 6 upon the net income of every resident individual and every domestic corporation and upon the net income of every foreign corporation and every nonresident individual employed or engaged in the transaction of business in, into or from the State, or deriving any income from any property or employment within the State."

4. §7-2-11 NMSA 1978 (Income allocation) provides:

"At the election of any taxpayer, net income may be, and during the first taxable year in which an individual incurs tax liability as a resident, shall be, prior to the application of the tax rates provided in §§7-2-7 and 7-2-8 NMSA 1978, apportioned and allocated as follows:

A. during the first taxable year in which an individual incurs tax liability as a resident, only income earned on or after the date he became a resident and, in addition, income earned in New Mexico while a nonresident of New Mexico shall be allocated to New Mexico;

B. except as provided otherwise in Subsection A of this section, income other than compensation shall be allocated and apportioned as provided in the Uniform Division of Income for Tax Purposes Act (7-4-1 to 7-4-21 NMSA 1978);

C. except as provided otherwise in Subsection A of this section, compensation of a resident taxpayer shall be allocated to this state;

D. compensation of a nonresident taxpayer shall be allocated to this state to the extent that such compensation is for activities, labor or personal services within this state;

E. except as provided otherwise in Subsection A of this section, nonbusiness income as defined in the Uniform Division of Income for Tax Purposes Act not otherwise allocated or apportioned in the Uniform Division of Income for Tax Purposes Act shall be equitably apportioned in accordance with regulations of the commissioner; and

F. other deductions and exemptions allowable in computing federal taxable income and not specifically allocated in the Uniform Division of Income for Tax purposes Act shall be equitably apportioned in accordance with regulations of the commissioner."

5. §7-2-14.1 NMSA 1978 (Food tax credit) provides:

"A. Any resident who files an individual New Mexico income tax return and who is not a dependent of another taxpayer may claim a food tax credit for gross receipts taxes on food purchases to which he has been subject during the taxable year for which the return is filed. The tax credit provided by this section shall be in an amount equal to forty dollars ($40.00) for each exemption domiciled in New Mexico allowed for federal income tax purposes.

B. No claim for the tax credit provided in this section shall be filed by a resident who was an inmate of a public institution for more than six months during the taxable year for which the tax credit could be claimed or who was not physically present in New Mexico for at least six months during the taxable year for which the tax credit could be claimed.

C. The tax credit provided for in this section may be deducted from the taxpayer's New Mexico income tax liability for the taxable year. If the tax credit exceeds the taxpayer's income tax liability, the excess shall be refunded to the taxpayer."

6. §7-2-15 NMSA 1978 (medical and dental expenses) provides:

"A. Any resident who files an individual New Mexico income tax return and who is not dependent of another tax-

payer may claim a tax credit for the taxable year in an amount equal to the amount computed under Paragraph (1) or Paragraph (2) of this subsection:

(1) an amount of five dollars ($5.00) for each exemption allowed for federal income tax purposes; or

(2) four percent of the gross amount of expenditures in New Mexico for medical and dental expenses allowable in computing the deductible medical and dental expenses for federal income tax purposes, excluding from the allowable deductions amounts paid for hospital services not subject to the Gross Receipts and Compensating Tax Act and health and accident insurance premium costs.

B. No claim for the tax credit provided in this section shall be filed by a resident who was an inmate of a public institution for more than six months during the taxable year for which this tax credit could be claimed or who was not physically present in New Mexico for at least six months during the taxable year for which the tax credit could be claimed.

D. The credit provided by this section may be deducted from the taxpayer's New Mexico income tax liability for the taxable year. If the tax credit exceeds the taxpayer's income tax liability, the excess shall be refunded to the taxpayer."

7. §7-2-19 NMSA 1978 (Credit for taxes paid other states by nonresident individuals) provides:

"Whenever a nonresident individual taxable under this Income Tax Act has become liable for income tax to the state where he resides upon his net income for the taxable year, derived from sources within this state and subject to taxation under this Income Tax Act, the amount of income tax payable by him under this act shall be credited with such proportion of the tax so payable by him to the state where he resides as his income subject to taxation under this Income Tax Act bears to his entire income upon which the tax so payable to such other state was imposed; provided, that such credit shall be allowed only if the laws of said state grant a

substantially similar credit to residents of this state subject to income tax under such laws, or impose a tax upon the personal incomes of its residents derived from sources in this state and exempt from taxation the personal incomes of residents of this state. No credit shall be allowed against the amount of the tax on any income taxable under this Income Tax Act which is exempt from taxation under the laws of such other state."

8. §7-4-3 NMSA 1978 (Allocation and apportionment of income in general) provides:

"Any taxpayer having income which is taxable both within and without the state, other than the rendering of purely personal services by an individual, and making the election to do so as provided in the Income Tax Act, shall allocate and apportion his income as provided in the Uniform Division of Income for Tax Purposes Act."

9. §7-4-4 NMSA 1978 (When taxable in another) provides:

"For purposes of allocation and apportionment of income under the Uniform Division of Income for Tax Purposes Act, a taxpayer is taxable in another state if:

A. in that state he is subject to a net income tax . . . or

B. that state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether the state does or does not."

10. §7-4-21 NMSA 1978 (Uniform Division of Income Tax Purposes Act) provides:

"The Uniform Division of Income for Tax Purposes Act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it."

11. §19-2-8 NMSA 1978 (Cession of jurisdiction to the United States) provides:

"That exclusive jurisdiction is hereby ceded to the United States over all the territories set apart from the public domain

and comprised within the limits of . . . Ft. Bliss Target Range and over such land as may hereafter be reserved from the public domain for the enlargement of said reservations; provided, however, that the state of New Mexico reserves the right to serve civil or criminal process within said reservations in suits or prosecutions for or on account of rights acquired, allegations incurred or crimes committed in said state, but outside of such cession and reservations; and provided further, that the jurisdiction herein ceded shall continue no longer and the United States shall own and hold said reservations for military purposes."

No. 80-1102

IN THE

Supreme Court of the United States

October Term, 1980

LAWRENCE LUNG, ET AL.,
Appellants,

v.

FRED L. O'CHESKEY, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

JEFF BINGAMAN
Attorney General of New Mexico

SARAH E. BENNETT
Assistant Attorney General

Taxation and Revenue Department
Post Office Box 630
Santa Fe, New Mexico 87509
(505) 827-3221

VERGARA PRINTING CO. • SANTA FE, NEW MEXICO

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
ARGUMENT	2
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

Cases

Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967), *appeal dismissed for want of a substantial federal question*, 390 U.S. 714 (1967) . 6, 11

Austin v. New Hampshire, 420 U.S. 656 (1975) . . . 7, 8, 10

Baldwin v. Fish & Game Commission of Montana, 436 U.S. 371 (1978) 10

Berry v. State Tax Commission, 241 Ore. 580, 397 P.2d 780 (1964), *appeal dismissed for want of a substantial federal question*, 382 U.S. 16 (1965) . . . 5

Central Machinery v. Arizona State Tax Commission, ____ U.S. ____, 100 S.Ct. 2592 (1980). 4

Davis v. Franchise Tax Board, 139 Cal.R. 797, 71 Cal.App.3rd 998 (1977), *appeal dismissed for want of a substantial federal question*, 434 U.S. 1055 (1978). 5, 10

Edelman v. Jordan, 415 U.S. 651 (1974). 4

Goodwin v. State Tax Commission, 146 N.Y.S.2d 172, 286 App.Div. 694 (1955), *aff'd mem.*, 1 N.Y.2d 680, 150 N.Y.S.2d 203, 133 N.E.2d 77, *appeal dismissed for want of a substantial federal question*, 352 U.S. 805 (1956). 5, 10

Hicks v. Miranda, 422 U.S. 332 (1975) 4

Page

Howard v. Commissioners of Sinking Fund, 344 U.S. 624 (1953) 5

Kiker v. City of Philadelphia, 31 A.2d 289 (Penn. 1943), *cert. denied*, 320 U.S. 741 (1943) 3

Kingsley Int. Pic. Corp. v. Regents of N.Y.U., 360 U.S. 684 (1959) 10

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973) 4

Meek v. Pettenger, 421 U.S. 349 (1975) 4

Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 725 (1980) 9

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) 9

Nonresident Taxpayers Association v. Municipality of Philadelphia, 341 F. Supp. 1135 (D.N.J. 1971), *aff'd*, 406 U.S. 951 (1972) 6

Nonresident Taxpayers Association v. Municipality of Philadelphia, 341 F.Supp. 1139 (D.N.J. 1971), *aff'd*, 406 U.S. 951 (1972) 6

Richardson v. Ramirez, 418 U.S. 24 (1974). 4

Salomon v. State Tax Commission, 278 U.S. 484 (1929) 11

Shaffer v. Carter, 252 U.S. 37 (1920) 2, 5, 8, 10

State ex rel. Appleby v. District Court, 46 N.M. 376, 129 P.2d 338 (1942) 3

State of Alaska v. Petronia, 69 Wash.2d 640, 418 P.2d 755 (1966), *appeal dismissed for want of a substantial federal question*, 389 U.S. 7 (1967) . 3, 4, 6, 7

Stephen v. State Tax Commissioner, 245 A.2d 552 (Del. 1968), *appeal dismissed*, 394 U.S. 573 (1968). . . . 6

Thomas v. Gay, 169 U.S. 264 (1898) 3

Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920). . 2, 5, 8

Warren Trading Post v. Arizona State Tax Commission, 380 U.S. 685 (1965) 4

Page

White Mountain Apache Tribe v. Bracker, ____ U.S. ____, 100 S.Ct. 2578 (1980) 4

Wilson v. Department of Revenue, 267 Ore. 103, 514 P.2d 1334 (1973), *appeal dismissed for want of a substantial federal question*, 416 U.S. 964 (1974) . . 5

Wisconsin v. J. C. Penney, 311 U.S. 435 (1941) 2

Statutes (United States Code):

Buck Act, 4 U.S.C. Section 104, *et seq.*, (1977) 4

10 U.S.C. Section 2671 (1975) 3

16 U.S.C. Section 457 (1974) 3

Federal Assimilative Crimes Act, 18 U.S.C. Section 13 (1969) 3

26 U.S.C. Section 3305 (1979) 3

I.R.C. Section 3, 26 U.S.C. Section 3 (1979 Supp.). . . . 9

I.R.C. Section 63, 26 U.S.C. Section 63 (1979 Supp.). . . 9

40 U.S.C. Section 290 (1969) 3

New Mexico Statutes:

Sections 7-2-1 through 7-2-22 NMSA (1978) 8

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1102

LAWRENCE LUNG, ET AL.,
Appellants,

v.

FRED L. O'CHESKEY, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of New Mexico, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ARGUMENT

The heart of Appellants' contentions is that New Mexico's Income Tax Act infringes upon their rights guaranteed by the Due Process, Equal Protection, Commerce and Privileges and Immunities Clauses of the United States Constitution.

Since 1920, these contentions have been firmly settled against Appellants:

> The very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such nonresidents, although not personally, yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state.
>
> *Shaffer v. Carter*, 252 U.S. 37 (1920).

In both *Shaffer v. Carter, supra,* and its companion case, *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), the Court established the rule that, absent a discriminatory effect, imposition of a state income tax on income of a nonresident from sources within the taxing state violates neither the Due Process, Equal Protection, Privileges and Immunities or Commerce Clauses of the United States Constitution.

The constitutional strictures imposed upon a state in its power to tax are not rigid:

> A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.
>
> *Wisconsin v. J. C. Penney*, 311 U.S. 435 (1941).

Without citing any favorable precedent, Appellants interpret this famous due process language to require a "fiscal relation" between the amount of taxes exacted from a taxpayer and the amount of benefits accruing especially to him. The courts have never required the state to return to a taxpayer tangible benefits or services in direct proportion to the amount of tax dollars paid. *State of Alaska v. Petronia,* 69 Wash.2d 640, 418 P.2d 755 (1966), *appeal dismissed for want of a substantial federal question,* 389 U.S. 7 (1967); *Thomas v. Gay,* 169 U.S. 264 (1898).

Moreover, contrary to assertion of Appellants, substantial benefits are provided each of them by the State of New Mexico. The obvious and primary benefit is that each of them is employed within the state.[1] When they leave their homes each day, they travel as safely as New Mexico citizens, secure in their knowledge that they travel in civilization, governed by laws which protect them as well as their New Mexico brothers and sisters.[2] Nonresidents share in the entitlement of residents to obtain judicial relief for wrongs done them in New Mexico.[3] The holding of the Supreme Court of New Mexico – that the intangible benefits derived from the "fruits of civilization" and the "opportunity to exercise intelligence, skill, and labor while employed in the State of New Mexico" are sufficient to justify

---

1 See *Kiker v. City of Philadelphia,* 31 A.2d 289 (Penn. 1943), *cert. denied,* 320 U.S. 741 (1943).

2 Even on the federal reservation, state laws govern by specific act of Congress: under the Federal Assimilative Crimes Act, 18 U.S.C. Section 13 (1969), acts not punishable by any enactment of Congress are punishable by the then effective laws of the state in which the enclave is situated; state workmen's compensation laws protect those working within a federal enclave, 40 U.S.C. Section 290 (1969), as do state wrongful death and tort laws, 16 U.S.C. Section 457 (1974); state unemployment compensation laws apply within a federal enclave, 26 U.S.C. Section 3305 (1979); state fish and game laws also apply within the federal enclave, 10 U.S.C. Section 2671 (1975).

3 *State ex rel. Appleby v. District Court,* 46 N.M. 376, 129 P.2d 338 (1942).

imposition on nonresidents of an income tax – was mandated by the case law. *State of Alaska v. Petronia, supra.*[4]

Appellants' attempt to analogize this case to cases governing imposition of state taxes on Indian reservations is inappropriate. Both cases cited by Appellants concerned whether or not state taxation of receipts from on-reservation activities was barred by the preemption doctrine, not whether the Commerce Clause or the Fourteenth Amendment barred imposition of the tax. *White Mountain Apache Tribe v. Bracker,* ____ U.S. ____, 100 S.Ct. 2578 (1980); *Central Machinery v. Arizona State Tax Commission,* ____ U.S. ____, 100 S.Ct. 2592 (1980). No preemption argument is raised by these appellants, and even if it had been, standards for preemption developed in Indian cases would not be applicable in this non-Indian context. *White Mountain Apache Tribe v. Bracker, supra.*

Far from preempting the states from imposing income taxes on federal areas, Congress has affirmatively granted to each state the power to impose its income taxes on income earned in federal areas located within the borders of the state by its adoption of the Buck Act, 4 U.S.C. Section 104, *et seq.* (1977), which provides comprehensive federal guidance for state taxation of those living within federal areas. *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164 (1973). The Buck Act expressly excepts Indians from its application. 4 U.S.C. Section 109; *McClanahan v. State Tax Commission of Arizona, supra; Warren Trading Post v. Arizona State Tax Commission,* 380 U.S. 685, at 691, fn. 18 (1965). The Buck Act has been interpreted by this Court to allow a state to tax earnings from

---

[4] A decision by this Court to dismiss an appeal from a state court on the grounds that the constitutional challenge is not a substantial one is a decision on the merits, binding on the lower courts until reversed by the Supreme Court. *Hicks v. Miranda,* 422 U.S. 332 (1975); *Meek v. Pettenger,* 421 U.S. 349 (1975); *Edelman v. Jordan,* 415 U.S. 651 (1974); *Richardson v. Ramirez,* 418 U.S. 24 (1974).

a federal reservation within its boundaries "just as if the Federal Government were not there." *Howard v. Commissioners of Sinking Fund,* 344 U.S. 624, at 628 (1953).

Taxpayers erroneously argue that this Court has never addressed the merits of its arguments concerning the limits of the state's power to tax the income of a nonresident from sources within the state. In addition to laying to rest the ultimate questions in *Shaffer v. Carter, supra,* and *Travis v. Yale & Towne Mfg. Co., supra,* this Court has had the opportunity on numerous occasions to consider the multitude of variations on the theme, and has dealt with the issues summarily.

This Court reviewed New York's statute allowing residents certain deductions from income not allowed to nonresidents, and limiting deductions for nonresidents to those connected with the production of income within the state; the Court determined that the case presented no substantial federal question.[5] Similar provisions in Oregon's income tax statute were raised by appeal, and summarily dismissed.[6] An appeal from the holding of the California Supreme Court that California's statute denying nonresidents the option of income averaging does not violate the Privileges and Immunities Clause, was similarly disposed of.[7] An appeal from a decision of the Nebraska

---

5 *Goodwin v. State Tax Commission,* 146 N.Y.S.2d 172, 286 App.Div. 694 (1955), *aff'd mem.,* 1 N.Y. 2d 680, 150 N.Y.S.2d 203, 133 N.E.2d 77, *appeal dismissed for want of a substantial federal question,* 352 U.S. 805 (1956).

6 *Wilson v. Department of Revenue,* 267 Ore. 103, 514 P.2d 1334 (1973), *appeal dismissed for want of a substantial federal question,* 416 U.S. 964 (1974); *Berry v. State Tax Commission,* 241 Ore. 580, 397 P.2d 780 (1964), *appeal dismissed for want of a substantial federal question,* 382 U.S. 16 (1965).

7 *Davis v. Franchise Tax Board,* 139 Cal.R. 797, 71 Cal.App.3rd 998 (1977), *appeal dismissed for want of a substantial federal question,* 434 U.S. 1055 (1978).

Supreme Court, holding proper the limitation to residents only of Nebraska's "food sales tax credit" against income taxes, was summarily dismissed by this Court.[8] Alaska's income tax was challenged, as violating various constitutional provisions as applied to nonresidents; the appeal was dismissed by this Court for want of a substantial federal question.[9] This Court summarily affirmed the decision of a New Jersey federal district court holding that city and state income taxes, when applied to nonresidents working in a naval shipyard, did not violate the Due Process, Equal Protection, Privileges and Immunities or Commerce Clauses of the United States Constitution or the civil rights of the plaintiffs,[10] and, further, that these arguments did not even present a substantial federal question.[11] This Court also summarily rejected the arguments of taxpayers that nonresidents should be allowed a reduction in the amount of income taxes paid to a state, to reflect the reduced benefits provided by the state to nonresidents.[12]

The question presented in *State of Alaska v. Petronia, supra,* is most pertinent to the present case. That was an action by the Alaska Attorney General, in the courts of Washington, to collect payment of income taxes from seamen, whose duties were performed exclusively onboard ship, relating principally to operation and maintenance of their employer's vessel. Although a substantial portion of the seamen's pay was earned within

---

8 *Anderson v. Tiemann,* 182 Neb. 393, 155 N.W.2d 322 (1967), *appeal dismissed for want of a substantial federal question,* 390 U.S. 714 (1967).

9 *State of Alaska v. Petronia,* 69 Wash.2d 460, 418 P.2d 755 (1966), *appeal dismissed for want of a substantial federal question,* 389 U.S. 7 (1967).

10 *Nonresident Taxpayers Association v. Municipality of Philadelphia,* 341 F.Supp. 1139 (D.N.J. 1971), *aff'd,* 406 U.S. 951 (1972).

11 *Nonresident Taxpayers Association v. Municipality of Philadelphia,* 341 F.Supp. 1135 (D.N.J. 1971), *aff'd,* 406 U.S. 951 (1972).

12 *Stephen v. State Tax Commissioner,* 245 A.2d 552 (Del. 1968), *appeal dismissed,* 394 U.S. 573 (1968).

the boundaries of the State of Alaska, the seamen never stepped on shore except as tourists, nor were their employers Alaskan residents. Similarly to these Texas residents, those seamen argued that they received no benefits, or minimal benefits, from Alaska, that the only benefit received – the right to fish in Alaska's coastal waters – was granted by the federal government, not by Alaska, and that the Alaska tax therefore violated the Due Process and Commerce Clauses. The Washington Supreme Court held the income earned while in Alaska waters was properly taxable by Alaska, finding the wages received by the seamen were the benefit justifying the tax:

> The business productivity generated by Alaska was accountable for the wages earned by the defendants when they were in Alaskan waters .... We are satisfied that the benefits of employment afforded by this economic activity of the state of Alaska constitutes minimum connections within the rule to avoid a denial of due process under the Fourteenth Amendment to the United States Constitution.
>
> *State of Alaska v. Petronia*, 418 P.2d at 758.

This Court determined the seamen's appeal from that holding did not raise a substantial federal question. 389 U.S. 7 (1967).

Additionally, these appellants argue in Section B of the jurisdictional statement that New Mexico allows lower exemptions to nonresident taxpayers than to residents and that therefore they are the subjects of discrimination in violation of the Privileges and Immunities Clause. Undeniably, the rights secured to all citizens by the Privileges and Immunities Clause are jealously guarded by the decisions of this Court. In the context of local taxes, this Court's decisions reflect careful scrutiny of those statutes distributing tax burdens on the basis of residence or nonresidence, to determine whether additional tax burdens have been unreasonably imposed upon nonresidents. *Austin v. New Hampshire*, 420 U.S. 656 (1975). The appropriate test is "the practical effect and operation" of the tax,

Shaffer v. Carter, supra, the "concrete, the particular incidence" of the tax, *Travis v. Yale & Towne Mfg. Co., supra; Austin v. New Hampshire, supra.*

Thus, an examination of the particulars of New Mexico's taxing structure is critical to the inquiry. New Mexico imposes its tax directly on "federal taxable income."[13] No statutory deductions are allowed, nor are there any exemptions applicable to these plaintiffs.[14] The exemptions described by appellants are those allowed under the Internal Revenue Code.[15] Net compensation of a nonresident is then allocated to this state to the extent it is paid "for activities, labor or personal services within this state." Section 7-2-11(D) NMSA (1978).

The amount statutorily allocated to New Mexico is not the gross wages earned here, nor is the amount allocated out-of-state a gross income figure. Before allocation, a taxpayer's entire gross income is reduced by his federal deductions and exemptions. Therefore, income allocated is net income. Obviously, a

---

13 Section 7-2-2(S) NMSA (1978); amounts it is prohibited from taxing either by local or federal law are excluded, Section 7-2-2(T) NMSA (1978).

14 The exemptions provided in the income tax are found at Section 7-2-4 NMSA (1978) for banks, insurance companies and similar organizations, pension trusts, and not for profit organizations; Section 7-2-5 NMSA (1978) for certain civil service annuities; Section 7-2-6 NMSA (1978) for annuities for retired judges; and Section 7-2-5.1 NMSA (1979 Supp.) for certain military retirement pay.

15 Taxpayer's argument is obviously based on the New Mexico income tax return form, rather than the New Mexico income tax law, and demonstates a misunderstanding of the New Mexico income tax, which appears at Sections 7-2-1 through 7-2-22 NMSA (1978). An examination of the act reveals that the tax is imposed directly upon "federal taxable income." However, a nonresident must list federal deductions and exemptions on the form and subtract them from his total federal adjusted gross income. This computation is necessary to arrive at the figure which is known as federal "taxable income," and consequently New Mexico "base income."

Cont. on p. 9

taxpayer does not take the full amount of his federal exemptions out of the amount allocated to only one state. It is this resulting allocation of federal exemptions and deductions of which these taxpayers complain. Appellants want the formula to allocate gross income, then allow subtraction of all their federal deductions and exemptions from the gross income amount attributable only to New Mexico.

Allocation and apportionment formulas have been reviewed by this Court on numerous occasions. It is not at all uncommon for the state law to require allocation or apportionment of a federal net income figure. See e.g., *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 725 (1980); *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 (1978). There is no constitutional defect in requiring allocation of a net income figure, or in requiring allocation and apportionment of federal exemptions and deductions in relation to the amount of total federal taxable income attributable to the taxing state. *Mobil Oil Corp. v.*

Cont. from p. 8

Section 7-2-2(S) NMSA (1978). Those figures would have come from that line on the federal return form 1040 which shows federal "taxable income," except that the federal return no longer requires calculation of federal "taxable income." The Internal Revenue Code now provides for calculation of individual income taxes based upon a tax table. I.R.C. Section 3, 26 U.S.C. Section 3 (1979 Supp.) "Tax table income" is defined in Section 3(a)(4) as adjusted gross income reduced by the excess itemized deductions and increased by the unused zero bracket amount. However, "taxable income" is defined to mean adjusted gross income reduced by excess itemized deductions and deductions for personal exemptions, and increased by the unused zero bracket amount. I.R.C. Section 63, 26 U.S.C. Section 63 (1979 Supp.). Thus, the amount actually reported by individuals for federal income tax purposes is a different amount than the amount required to be reported as federal "taxable income" for state income tax purposes, and the state has had to reconstruct those calculations on its form in order to come up with the appropriate tax base.

Commissioner of Taxes, supra; see also, *Goodwin v. State Tax Commission,* 146 N.Y.S.2d 172, 286 App.Div. 694 (1955), *Aff'd mem.,*1 N.Y.2d 680, 15 N.Y.S.2d 203, 133 N.E.2d 77, *appeal dismissed for want of a substantial federal question,* 352 U.S. 805 (1956); *Shaffer v. Carter, supra.*

However, these taxpayers argue that, because Texas has no income tax, they do not receive a reduction against any state income taxes for those federal exemptions and deductions allocated outside New Mexico, and that New Mexico's taxing scheme is therefore invalid as applied to them. This argument has never been adopted; the validity of New Mexico's tax does not depend on the present configuration of Texas' tax structure. *Austin v. New Hampshire, supra.*

In Section C of the Jurisdictional Statement, Appellants argue that New Mexico's rebate program is unconstitutional in denying to nonresidents the minimum rebates. The rebates challenged by the appellants were construed by the New Mexico Supreme Court to be measures designed to give relief from gross receipts taxes on necessity items to those who actually bear the burden of those taxes.[16] (Appendix "A," p. 4a). The question remaining is whether the distinction made between resident and nonresident is in pursuit of legitimate state interests. *Baldwin v. Fish & Game Commission of Montana,* 436 U.S. 371 (1978); *Davis v. Franchise Tax Board, supra.*

Ample evidence was produced at trial to support the reasonableness of the scheme. The legislature's residency requirement was based on the assumption that necessity items are usually purchased in the state in which one resides; the requirement that a claimant must have lived within New Mexico and outside a public institution for six months or more of a taxable year

---

16 That construction of a state statute by the highest court of that state is not subject to review here. *Kingsley Int. Pic. Corp. v. Regents of N.Y.U.,* 360 U.S. 684 (1959).

insures that each rebate recipient has actually paid the gross receipts taxes he is refunded. (See Appendix "C," Findings of Fact Nos. 15-32). That a tax mechanism is inexact in its operation does not make it constitutionally invalid. *Saloman v. State Tax Commission,* 278 U.S. 484 (1929). A strikingly similar rebate scheme was reviewed and upheld by the Nebraska Supreme Court in the case of *Anderson v. Tiemann,* 182 Neb. 393, 155 N.W.2d 311 (1967); the Nebraska court rejected the precise arguments advanced by these appellants, and this Court dismissed the appeal for want of a substantial federal question, 390 U.S. 714 (1967).

CONCLUSION

Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of New Mexico.

Respectfully submitted,

JEFF BINGAMAN
Attorney General of New Mexico

Sarah E. Bennett

SARAH E. BENNETT
Assistant Attorney General

Taxation and Revenue Department
Post Office Box 630
Santa Fe, New Mexico 87509
(505) 827-3221

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 1981, I, Sarah E. Bennett, a member of the bar of the Supreme Court, caused to be mailed, postage prepaid, three copies of the foregoing Motion to Dismiss or Affirm to Fred J. Morton, Counsel for the Appellants, at 210 N. Campbell, El Paso, Texas 79901. I further certify that all parties required to be served have been served.

Sarah E. Bennett

SARAH E. BENNETT
Assistant Attorney General

No. 80-1102

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

LAWRENCE LUNG, et al.,

Appellants,

VS.

FRED L. O'CHESKEY, et al.,

Appellants,

ON APPEAL FROM THE
SUPREME COURT OF NEW MEXICO

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Of Counsel:
JOHN P. OTTO
45 W. Jefferson
Phoenix, Arizona
(602) 252-7461

FRED J. MORTON
210 N. Campbell
El Paso, Texas 79901
(915) 532-3601
Attorney for Appellants

TABLE OF CONTENTS

Page

Table of Authorities i
Argument 1
Conclusion 8
Certificate of Service 9

TABLE OF AUTHORITIES

Cases:

Central Machinery Co. v. Arizona Tax Com'n., ____U.S.____, 100 S. Ct. 2592 (1980) 2
Goodwin & State Tax Com'n, 146 N.Y.S. 2d 172, aff'd mem., 1 N.Y. 2d 680 133 N.E. 2d77, dism'd, 352 U.S. 805 (1956) . 5
McClanahan v. State Tax Com'n., 411 U.S. 164 (1973) 3
Norfolk v. W. Ry. Co. v. Missouri State Tax Com'n., 390 U.S. 317 (1968) 4
Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869) 4
Richardson v. Ramirez, 418 U.S. 24 (1974) 4
State of Alaska v. Petronia, 418 P.2d 755 (Wash. 1966) dism'd 389 U.S. 7 (1967) 4
Tiffany Const. Co. v. Bureau of Revenue, 603 P.2d 332 (N.M. App. 1979), rev'd and remanded, _____ U.S. , 100 S. Ct. 3041 (1980) 2,3
Toomes v. Witsell, 334 U.S. 385 (1948 4
Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920) 5
Washington v. Confederated Tribes, ____U.S.____, 100 S. Ct. 2069 (1980) 2,3
White Mountain Apache Tribe v. Bracker, ____U.S.____, 100 S. Ct. 2578 (1980) 2,3

Constitutional Provisions:

Article I, §8, Cl. 3 (Commerce) 4
Article IV, §2 4
Fourteenth Amendment (Due Process Clause) 4

Statutes:

Buck Act, 4 USC §104 et seq. 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-1102

LAWRENCE LUNG, et al.,

Appellants,

V.

FRED L. O'CHESKEY, et al.,

Appellees

ON APPEAL FROM THE
SUPREME COURT OF NEW MEXICO

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellants respectfully submit the following Brief Opposing Motion to Dismiss or Affirm (which has been filed by Appellees herein) as follows:

ARGUMENT

Appellees' Motion to Dismiss or Affirm seeks to remove this Court's attention from its recent cases involving state taxation on Indian reservations (including one from the New Mexico courts which mirrors the instant one in several ways) either by ignoring them or by categorizing them as simply involving the preemption principle, which is not an issue here. In view of the similarity of the issues and concepts, Appellants believe these recent decisions establish the substantiality of the questions involved here, and

deserve closer and more accurate analysis in determining whether this case will receive the plenary review it deserves.

Although preemption appears to have been the basis for invalidating state taxes in two *(White Mountain Apache Tribe v. Bracker*, ____U.S.____, 100 S.Ct. 2578 (1980), and *Central Machinery Co. v. Arizona Tax Com'n.*, ____U.S.____, 100 S.Ct. 2592 (1980)) of the four cases cited by Appellants, Apellees ignored the other two, both of which con- cern the critical issue of "fiscal relation". *Washington v. Confederated Tribes*, ____U.S. ____, 100 S.Ct. 2069 (1980), ignored by Appellees, invalidated by a 7-2 vote Washington's motor vehicle tax assessed on its market value, because it was not tailored to cover only taxable off-reservation use, where the Indian taxpayer could be said to be the recipient of state services. Also ignored by Appellees was the product of its own court system, *Tiffany Construction Co. v. Bureau of Revenue*, 603 P.2d 332 (N.M. App. 1979) in which this court entered a summary order, ____U.S.____, 100 S.Ct. 3041 (1980), reversing the remanding the case in light of White Mountain Apache Tribe and Central Machinery Co., supra. Tiffany concerned the New Mexico gross receipts tax levied upon a road construction contractor for work done entirely on a Navajo reservation in New Mexico, on which some of the roads were maintained by the state.[1]

Relevant to this case is the fact that all of these cases discuss the extent to which the taxing authority is getting something for nothing, which is the crux of this case. Generalizations of the past shed little, if any, light on the question of what fiscal values this Court deems attributable *to the state* so as to justify the exaction of the full measure of the state's power to tax. It is abundantly clear from the history of the New Mexico courts that 'minimal contact" is all that is required, ignoring how little or non-existent the fiscal

1. After remand, the New Mexico Court of Appeals reinstated its opinion in Tiffany, stating that preemption had not been raised by the taxpayers. This opinion has not appeared in the national reporter system, and may not appear, as counsel for the taxpayers advise that the New Mexico Supreme Court has granted certiorari in the case but has not set it for arguments as of February 9, 1981. The Court of Appeals opinion after remand may be found in State Bar of New Mexico Bulletin and Advance Opinions (ISSN 0039-0038), Vol. 19, N. 40, October 2, 1980, at pp. 918, 919.

relationship may be between what is taxed and how much the state has to do with creating, protecting or benefiting the taxable incidents. "Even if Tiffany had received no other benefits from the state, it would be subject to the state tax from the simple fact of having engaged in business here," *Tiffany Construction Co. v. Bureau of Revenue*, 603 P.2d 332 at 335 (N.M. App. 1979). This concept, reiterated by the New Mexico Supreme Court in this case in the phrase "fruits of civilization", is a meaningless generalization in terms of economic realities unless the state is entitled to full credit for the fact that WSMR is within the boundaries of the state, and nothing else is required. If this is the law, then why are the recent Indian reservation cases sprinkled through with discussions of services, benefits or protection afforded by the state? "The state has a legitimate governmental interest in raising revenues . . .strongest when the tax payer is recipient of state services," *Washington v. Confederated Tribes*, ____ U.S. ___, 100 S.Ct. at 2083 (1980); "The Due Process Clause may prohibit a state from imposing a tax on the use of completely private roads if the tax is designed to reimburse it for use of state-owned roads," Justice Stevens in dissent, *White Mountain Apache Tribe v. Bracker*, ____U.S.____, 100 S.Ct. at 2591, n.7 (1980); "The state has no interest in raising revenues from the use of Indian roads that costs it nothing and over which it exercises no control," Justice Powell dissenting and concurring, ____U.S. ____, 100 S.Ct. 2599 (1980). These cases demonstrate the need for this Court to squarely answer the serious questions raised by this case concerning the power of the states to fully tax non-residents who cross over into their boundaries, but enjoy no more in the way of State-conferred benefits than do those merely passing through untaxed.

Appellees correctly state that preemption is not applicable here and that, as this Court has stated, the Buck Act, 4 USC §104 et seq. "provides comprehensive federal guidance for state taxation of those *living within federal areas*," *McClanahan v. State Tax Com'n.*, 411 U.S. 164 at 176 (1973) (emphasis added). But the Buck Act does not comprehensively sweep away the non-resident's constitutional immunity from taxation by a state that renders them

no benefits or protection, nor does the state so claim. Is the scope of the Appellants' Privileges and Immunities under Article IV, §2 less than the protection afforded an out-of-state corporation under the due process and commerce clauses of the constitution, which protect it against a "gross overreaching", *Norfolk and W. Ry. Co. v. Missouri State Tax Com'n.*, 390 U.S. 317 (1968)? This would be an anamolous result in light of the fact that the corporations are not even considered "citizens" for Article IV, §2, purposes, *Paul v. Virginia*, 75 U.S. (8 Wall) 168 (1869).

The other point which Appellees put forth is that the issues in this case have already been "decided" by this court, citing numerous cases in which summary dismissals of appeals have been entered, and concluding that entry of such a summary ordered here would be a meaningful and clear expression of the law in the area. Such is not the case as summary dispositions are "obviously not of the same precedential value as would be an opinion of this Court treating the question on the merits," Justices Marshall, Douglas and Brennan in dissent, *Richardson v. Ramirez*, 418 US 24 at 83 n. 27 (1974).

Appellees attach much significance to *State of Alaska v Petronia* 418 P.2d 755 (Wash. 1966), dism'd 389 U.S. 7 (1967), which Appellants believe to be distinguishable on several significant bases. First, the seamen earning in Alaskan waters that portion of their income (16%, etc.) which Alaska sought to tax was not on an exclusive federal enclave, as WSMR is, over which the state has no jurisdiction. This court has recognized the power of the states to regulate activities on off-shore waters, *Toomer v. Witsell*, 334 U.S. 385 (1948), so Petronia's income was no less "earned in Alaska" than if it had been in downtown Juneau, merely because it was earned off-shore. Secondly, the "business productivity generated by Alaska (which) was acccountable for the wages earned by the defendants when they were in Alaskan waters" contrasts with the nature of WSMR, a military testing site created by the federal government out of the desolate desert sands of New Mexico, isolated from any community or other business productivity generated by the state. Neither do Appellants view WSMR as their "home away from home" as a sailor in an Alaskan port might do. The proportional assessment on Alaska earned income also

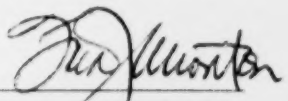
contrasts with the exaction by New Mexico of the full measure of its income tax on Appellants, coupled with the required inclusion of non-New Mexico income, as set forth in Section B of Appellants' Jurisdictional Statement herein.

In the area of the medical-dental expense and grocery tax rebates, attacked in Section C of Appellants' Jurisdictional Statement, it should be noted that in one of the leading cases cited by Appellees, *Goodwin v. State Tax Com'n.*, 146 N.Y.S. 2d 172, aff'd mem., 1 N.Y. 2d 680, 133 N.E. 2d 77, dism'd 352 U.S. 805 (1965), the court pointed out that the deductions disallowed to non-residents (residential real estate taxes, interest on the home mortgage, life insurance premiums and medical expenses) were "not allowances in a flat amount for all residents, which might be regarded as the equivalent of exemptions or exclusions from income within the meaning of the Travis case (*Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60). They are allowed only upon a case by case basis, on account of an actual expenditure *by the particular taxpayer*," 146 N.Y.S. 2d 172 at 181 (emphasis added). Such is not the case here as to New Mexico's exclusion or rebate of $5.00 and $40.00 *per exemption*, respectively, for residents only for medical-dental expense and grocery taxes.

CONCLUSION

Appellants believe the Motion to Dismiss or Affirm should be denied and overruled and this Court should note probable jurisdiction of this Appeal, or alternatively, issue a writ of certiorari to the New Mexico Supreme Court.

Respectfully submitted,

By: 

FRED J. MORTON
Attorney for Appellants
210 N. Campbell Street
El Paso, Texas 79901
(915) 532-3601

Of Counsel:

John P. Otto
45 West Jefferson
Phoenix, Arizona

CERTIFICATE OF SERVICE

This is to certify that on the 16 day of February, 1981, I, FRED J. MORTON, a member of the Bar of the Supreme Court of the United States, mailed, postage prepaid, three (3) copies of the foregoing Brief Opposing Motion To Dismiss Or Affirm to the Honorable Jeff Bingaman, Attorney General of the State of New Mexico, P.O. Drawer 1508, Bataan Memorial Building, Santa Fe, New Mexico 87503, and to Ms. Sarah Bennett, Assistant Attorney General, Taxation and Revenue Department of the State of New Mexico, P.O. Box 630, Santa Fe, New Mexico 87509, attorneys for Appellees. I further certify that all parties required to be served have been served.

FRED J. MORTON